

Appendix

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Clerk, U. S. Dist. Court
San Francisco

**United States District Court
for the Northern District of California**

Civil Action No. 52076

Anita Valtierra, Irene Valtierra, Jenny Valtierra, Robert Valtierra, Carol Valtierra, Cecilia Valtierra, Bertha Valtierra, Anthony Valtierra, Dorether Anderson, Dale Robert Anderson, Judy Lea Anderson, John Lee Anderson, Della Anderson, Jeff Alexander Anderson, Dolores Anderson, Gwendolyn Anderson, Thomas Anderson, Angie Duarte, Pauline Duarte, Jesus Duarte, Alfred Duarte, Eddie Duarte, all on behalf of themselves and others similarly situated, Plaintiffs,

vs.

The Housing Authority of the City of San Jose, a public entity; Rodmar H. Pulley, individually and as Executive Director of the Housing Authority of the City of San Jose; Mary R. Boyce, individually and as Chairman of the Board of Commissioners of the Housing Authority of the City of San Jose; Walter Rector, individually and as Vice-Chairman of the Board of Commissioners of the Housing Authority of the City of San Jose; David Reiser; Allen Bellandi; and Sam Obregon, individually and as Commissioners of the Housing Authority of the City of San Jose; The City Council of the City of San Jose; Ronald James, individually and as Mayor of the City of San Jose; Virginia C. Shaffer; Joseph Colla; Walter V. Hayes; David G. Goglio; and Kirk Gross, individually and as Councilmen for the City of San Jose; United States Department of Housing and Urban Development; George Romney, individually and as Secretary of the Department of Housing and Urban Development, Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, THREE JUDGE COURT REQUESTED

Plaintiffs Allege as Follows:

The Issue

1. This is an action to invalidate Article 34 of the California Constitution which prohibits any local governing body or housing authority from constructing or acquiring a federally financed low-income housing project without a majority vote of the population in the affected area. Such voter approval is required for housing for low-income persons but not for any other income group. The effect of requiring majority approval has been to sharply curtail the construction of decent and adequate low-income housing units.

Jurisdiction

2. Jurisdiction is conferred on this Court by 28 U.S.C. 1331, 1343, and 42 U.S.C. 1983, and by the Privileges and Immunities, Equal Protection and Supremacy Clauses.

3. The amount in controversy herein exceeds \$10,000.00 for each of the plaintiffs individually and for each member of their class in that the deprivation of decent, safe and sanitary housing causes damage to them in excess of that sum. But for the operation of Article 34, plaintiffs herein would have been benefited by the expenditure of federal funds for low-income housing in San Jose in excess of 17 million dollars. A three judge court is sought pursuant to 28 U.S.C. 2281.

Parties

4. The named plaintiffs are all citizens of the United States and residents of the City of San Jose. All are of low-income and reside in unsafe, unsanitary or overcrowded housing. All are on the waiting list for placement through the Housing Authority of the City of San Jose and have been on said list for more than one year.

5. Plaintiff Anita Valtierra and her seven minor children live in a one bedroom apartment owned by the City of San Jose. The Valtierras have suffered greatly from the smallness of their home. The entire family sleeps in a room $11\frac{1}{2}$ feet by $10\frac{1}{2}$ feet. The daily routine of the family is dictated by the confines of the apartment: the smaller children must stay in bed until the older ones have dressed and left for work or school; as they cannot all fit in the tiny kitchen-dining area, the family must eat meals in shifts; all the children cannot be bathed on any one evening because of insufficient water and space in the bathroom, the meagre clothing possessed by the family cannot be closeted in the one closet and must be stored in cardboard boxes in the one small bedroom. The Valtierra family was on the "emergency" waiting list of the San Jose Housing Authority before they found their present home, but they were removed from that list when they found even the oppressively overcrowded apartment because emergency cases are defined as only those persons who are totally without housing, *e.g.*, persons living in tents, cars, and parks. See plaintiff Valtierra's affidavit attached hereto, marked Exhibit A.

6. Plaintiff Dorether Anderson is the mother of eight children who all live with her in a three bedroom, one bathroom home. The home is not only overcrowded, but is infested with cockroaches. Plaintiff Anderson has been looking for another home for eight years. She has been on the waiting list of the San Jose Housing Authority continuously since November, 1966. See plaintiff Anderson's affidavit attached hereto, marked Exhibit B.

7. Plaintiff Angie Duarte is the head of a household of four minor children. She has been on the waiting list of the Housing Authority for more than one year. She left a residence which was dangerously deteriorating only to find that it was impossible for her to obtain a home for her family within her income range. When she did find a vacant apartment, the landlord invariably told her that he would allow only two children in each apartment. In desperation, plaintiff Duarte sent her two oldest children to stay with their grandmother in Arizona. She then was able to rent her present two bedroom apartment. She has re-united her family now, but lives in constant fear that the landlord will evict her as soon as he learns that there are four children living in the apartment. This fear is particularly oppressive because plaintiff Duarte knows it is impossible to find another apartment suitable to her needs. See plaintiff Duarte's affidavit attached hereto, marked Exhibit C.

8. Minor plaintiffs Irene Valtierra, Jenny Valtierra, Robert Valtierra, Carol Valtierra, Cecelia Valtierra, Bertha Valtierra, and Anthony Valtierra are

represented in this action by their general guardian, Anita Valtierra. Minor plaintiffs Dale Robert Anderson, Judy Lea Anderson, John Lee Anderson, Della Anderson, Jeff Alexander Anderson, and Dolores Anderson are represented in this action by their general guardian, Dorether Anderson. Minor plaintiffs Pauline Duarte, Jesus Duarte, Alfred Duarte, and Eddie Duarte are represented in this action by their general guardian, Angie Duarte.

9. Plaintiffs bring this action on their own behalf and on behalf of all others similarly situated, pursuant to Rule 23 of the Federal Rules of Civil Procedure. Plaintiffs and the class they represent consist of all persons who are citizens of the United States and who are on the waiting list of the Housing Authority of the City of San Jose. There are questions of law and fact common to the plaintiffs and the members of the class they represent affecting the validity of Article 34 and these common questions predominate this action. The members of the class are so numerous as to make joinder of all of them impracticable. The claims of plaintiffs are typical of the claims of all members of the class and plaintiffs fairly and adequately represent the claims of all members of the class.

10. Defendant Housing Authority of the City of San Jose [hereinafter Housing Authority] is a public entity established pursuant to California Health and Safety Code §§ 34200 *et seq.* Defendant Pulley is the Executive Director of the Housing Authority. Defendants Boyce, Rector, Reiser, Bellandi and

Obregon are duly appointed commissioners of the Housing Authority. All are sued individually and in their official capacity.

11. Defendant City Council of the City of San Jose [hereinafter City Council] is the governing body of the City of San Jose. The Department of Housing and Urban Development cannot approve an application for a preliminary loan for a low-income housing project under 42 U.S.C. 1415(7) unless there has been an authorizing resolution by the City Council. Plaintiffs are informed and believe and on this basis allege that the City Council will not approve any contracts for the construction of public housing in San Jose unless and until the proposal is approved by the electorate in accordance with Article 34.

12. Defendants James, Mineta, Shaffer, Colla, Hays, Goglio, and Gross are the duly elected councilmen of the City Council. They are sued as individuals and in their official capacity.

13. Defendant Housing and Urban Development [hereinafter HUD] is a department of the Executive Branch of the United States Government. Defendant Romney is the Secretary of HUD. Plaintiffs are informed and believe and on this basis allege that defendant Romney, acting in his official capacity, will refuse to approve use of federal funds to aid the construction of new public housing units in San Jose unless and until the proposal is approved by the electorate in accordance with Article 34.

The Public Housing Program in California

14. In 1937, The Congress of the United States enacted the Housing Act of 1937, 42 U.S.C. 1401 *et seq.*, which declares it to be the policy of the United States to employ its funds and credit to remedy "the unsafe and unsanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of low-income . . . injurious to health, safety, and morals of the citizens of the Nation." The above policy is to be carried out by the Housing Assistance Administration [hereinafter HAA] of HUD. The HAA makes a preliminary loan to a local authority when the local governing body has by resolution made a finding of need for low-income units and has authorized the particular loan application. The preliminary loan is used to pay for an option on a site and for other development expenses. Once the project plans have been developed and approved by HAA, tax-free bonds guaranteed by the federal government are sold to the public.

15. California set up the structure necessary to take advantage of the federal program in 1938 when it enacted the Housing Authorities Law (Health and Safety Code §§ 34200 *et seq.*). This act provides that there is in every county and city a public body corporate and politic known as the housing authority of the county or city. The housing authority is without power to transact business unless the governing body of the county or city declares that there is a need for a housing authority. Once activated as provided in the statute, a housing authority is empowered

to borrow and accept financial grants from the federal government and to lease, construct or otherwise acquire housing units. In keeping with the federal requirements, the local housing authority submits a proposal to the local governing body for approval before it is sent to HAA.

16. In November, 1950, Article 34 was added to the California Constitution by initiative. Section 1 reads in part as follows:

No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

The section goes on to define low rent housing project as one financed in whole or in part by the Federal Government or a state public body.

17. Article 34 nullifies the federal scheme for providing low income housing and the state procedures enacted to implement the federal scheme, 1) by imposing a burden not authorized or required by the federal statute; and 2) by conditioning the receipt of federal benefits by the underprivileged minority upon the unfettered discretion of the privileged majority.

18. Article 34 has had the effect of sharply curtailing the construction of new low-income housing

units in California. This effect is demonstrated by comparing California's rate of construction per low-income family group to that of three other states with a comparable low-income population: each of the other states has more than three times the per capita rate of California (California has constructed 23.4 low-income units per 1,000 low-income family groups compared with 60.1 per 1,000 in Pennsylvania, 66.7 per 1,000 in New York, and 73.1 per 1,000 in Illinois). See attached Affidavits of housing authority officials Marked Exhibits D, E, and H.

Public Housing in San Jose

19. On January 31, 1966, the Housing Authority of the City of San Jose was activated by resolution number 28714 of the City Council (a copy of which is attached hereto, marked Exhibit F). In said resolution, the City Council found that since there were unsanitary and unsafe housing accommodations in San Jose and since there was a shortage of safe and sanitary dwellings for persons of low-income to rent, there was a need for a housing authority to function.

20. San Jose is a rapidly growing metropolitan community. Much of its housing is old and deteriorated. A survey made by the Housing Division of the Santa Clara County Health Department in 1967 showed that 16 neighborhoods in the central area of San Jose had a significant number of blocks (3 or more) with substandard housing rates over 20%. This rate was considered by the Housing Division to be at the critical level. Besides new units needed

because of this deterioration, new units are needed because of rapid and sustained population growth.

21. The Housing Authority had a waiting list of 625 families at the end of July, 1969. Of those families, there were 164 "verified emergency applicants" who had been found to have no housing whatsoever.

22. In recognition of the critical housing shortage and pursuant to the requirements of Article 34, the City Council placed on the November, 1968, ballot a measure which would allow the Housing Authority to construct or acquire 1,000 units within the City. The units were to be scattered throughout the City in order to avoid racial and economic segregation.

23. On November 5, 1968, the said measure was defeated, 57,896 voters favoring and 68,527 opposing the measure. See Exhibit G, attached hereto.

For a First Claim

24. This action for declaratory relief is brought pursuant to 28 U.S.C. § 2201. Plaintiffs request a three judge court as required by 28 U.S.C. §§ 2281 and 2284. An injunction is prayed for pursuant to 42 U.S.C. § 1983.

25. Plaintiffs are entitled to relief since an actual controversy exists between the parties to this action, which controversy the plaintiff desires the Court to adjudge, defining and declaring the legal rights and duties of each party to the controversy.

26. Article 34 places a substantial burden upon plaintiffs in relation to other economic and racial

groups in their effort to secure decent, safe, and adequate housing within the City of San Jose. Such burden is imposed solely because plaintiffs are impoverished and for no legitimate governmental purpose.

27. Defendants herein have adhered to Article 34 by their policy and practice of refusing to process any application to HUD for funds to aid in the construction or acquisition of new low-income housing units unless and until Article 34 has been followed and a successful referendum has been accomplished.

28. The matter in controversy is whether the defendants' refusal denies plaintiffs the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

29. Plaintiffs and members of the class they represent are irreparably injured by the acts of defendants in that they are substantially burdened in their pursuit of safe, decent, and adequate housing as offered by the federal government in the United States Housing Act of 1937. The irreparable injury to plaintiffs and their class will continue unless and until defendants are enjoined by this Court. Plaintiffs have no adequate remedy at law.

For a Second Claim

30. Reference is made to Paragraphs 1-25, inclusive, and to Paragraphs 27 and 29, incorporating them herein by reference as if they were set out at length.

31. Article 34 creates an arbitrary condition on the plaintiffs' receipt of federal benefits conferred upon citizens of the United States by requiring that plaintiffs obtain the approval of the majority of the electorate in their community prior to receiving said benefits.

32. The matter in controversy is whether defendants' adherence to Article 34 deprives plaintiffs of their privileges and immunities as United States Citizens in violation of the Fourteenth Amendment to the United State Constitution.

For a Third Claim

33. Reference is made to Paragraphs 1-25, inclusive, and to Paragraphs 27 and 39, incorporating them herein by reference as if they were set out at length.

34. Article 34 conflicts with and is contrary to the United States Housing Act of 1937, in that it constitutes an additional and contrary burden on the ability of the federal government and local governmental entities to contract for the construction or public housing for low-income persons, contrary to the intent of Congress.

35. The matter in controversy is whether the defendants' adherence to Article 34 and the resultant conflict with the federal scheme is contrary to Article VI, Clause 2 (the "Supremacy Clause") of the United States Constitution.

Wherefore, Plaintiffs pray as follows:

1. That this Court declare Article 34 of the California Constitution void and of no effect.

2. That this Court enjoin the defendants, and each of them from refusing to proceed with the necessary steps leading to the construction of the 1,000 public housing units proposed by the Housing Authority of the City of San Jose in 1968, unless said units are approved in a voter referendum.

3. That this Court enjoin defendants, and each of them, from enforcing, following abiding by or relying on any of the provisions of Article 34 of the California Constitution.

4. For such other and further relief as is appropriate under the facts pleaded above or elicited at trial.

Dated: August 27, 1969.

/s/ Diane V. Delevett,
Attorney for Plaintiffs,
22 Martin Street,
Gilroy, California 95020

(Notary affidavit omitted)

Exhibit A

AFFIDAVIT

State of California,
County of Santa Clara—ss.

Anita Valtierra, being sworn says:

I am the mother of seven minor children: Irene Valtierra, age 16; Jennie Valtierra, age 15; Robert Valtierra, age 13; Carol Valtierra, age 11; Cecilia Valtierra, age 10; Bertha Valtierra, age 9; and Anthony Valtierra, age 8. I am a citizen of the United States and live with my family in the County of Santa Clara, City of San Jose. We all live together in a one bedroom apartment which belongs to the City of San Jose.

We were placed in that apartment when we could find no other place to live and were on the "emergency" waiting list for the Housing Authority. At that time I had all my children living in various homes of friends and relatives. The only way that I could reunite my family was to accept this tiny apartment. I thought since I had been on the waiting list of the Housing Authority, I would be provided with a larger home soon. I have now been on the waiting list for over a year and I continue to pay the rent of \$75.00 per month plus unsecured property taxes of \$21.00 per year for the one bedroom apartment. I wondered why I was removed from the emergency waiting list and I was told by an official of the Housing Authority that I could no longer be considered an emergency because there was some roof over my head.

Emergency families were only those that had no home at all.

When I have looked for other places to move, the only five bedroom homes available were renting at between \$175.00 and \$200.00 per month. With first and last month's rent and a cleaning deposit of approximately \$75.00, I would be required to pay a minimum of \$425.00 before I could move into an adequate home. In addition to the cost, five bedroom houses are very difficult to find because there just aren't enough of them being built to house all the families with many children.

My income is \$355.00 per month which I receive from the Welfare Department during the non summer months. My basic need has been computed by the Welfare Department to be \$516.00 per month, so I receive about \$148.75 less than the amount my family really needs. I can make up some of the difference between my basic need and what the welfare will pay by working during the summer in the cannery. When I work in the cannery, I earn about \$360.00 per month. The welfare gives me a supplement which brings my income close to my basic need of \$516.00 per month. During these months I can buy my family clothing and other items that they have needed during the year but which we could not afford to buy.

If we were placed with the Housing Authority, we would receive a five bedroom apartment for approximately \$97.00 per month. It would be guaranteed to be safe, clean and adequate. The Housing Authority can never give me any hope as to when I will be

placed in such a home, however, because they have such a long waiting list and they just tell me that I should keep phoning. They have never shown me a place nor have I been able to find a home with the landlord willing to lease to them.

/s/ Anita G. Valtierra

Subscribed and sworn to before me this 16th day of August, 1969.

(Seal)

/s/ Marina B. Fontanilla,
Notary Public in and for the
County of Santa Clara, Calif.

My commission expires February 10, 1973.

Exhibit B

AFFIDAVIT

State of California,
County of Santa Clara—ss.

Dorether Anderson, being sworn, says:

I am a citizen of the United States and a resident of San Jose. I live in a small three bedroom home with my eight children. For this house we pay \$125.00 per month, even though it is over crowded and infested with cockroaches. I have been trying to move to a larger and better home for eight years.

I have been on the waiting list of the Housing Authority continuously since I was found eligible in November of 1966. Since I have been on the waiting list, I have never been referred to a home and I have never been able to find a home suitable for my family where the landlord would lease to the Housing Authority.

When I look at five bedroom homes on my own, I find that they rent between \$200.00 and \$210.00 per month. Many of them require the payment of the first and last month's rent as well as a cleaning deposit of \$75.00. This means that I would need \$475.00 to \$500.00 to move into one of these homes. I earn approximately \$50.00 to \$75.00 per month as a domestic maid. The most the welfare can give me in addition is \$330.00 per month. The rent alone on a five bed-

room house would cost about 50% of my monthly income.

/s/ Dorether Anderson

Subscribed and sworn to before me this 16th day of August, 1969.

(Seal)

/s/ Marina B. Fontanilla,
Notary Public in and for the
County of Santa Clara, Calif.

My commission expires February 10, 1973.

Exhibit C

AFFIDAVIT

State of California,
County of Santa Clara—ss.

Angie Duarte, being sworn, says:

I am a citizen of the United States and a resident of San Jose, California. I live in a two bedroom apartment with my four children; Pauline Duarte, age 13; Jesus Duarte, age 11; Alfred Duarte, age 7; and Eddie Duarte, age 2. I have been on the waiting list of the Housing Authority of the City of San Jose for over a year.

I have always had a hard time finding a home for my family that I could afford. I had to move from my last home because it was in such a terrible condition that I knew it was not good for my children. Once I moved out, however, I found that there were no places available for a family of five that I could afford. The landlords of the smaller places that I could afford to rent would turn me down when they saw I had four children. Finally, I had to send two of my children to Arizona to stay with my mother-in-law so I could get an apartment that would take two children. Having found a two bedroom apartment, I have now brought my other two children back with me. I live in fear that I will be evicted when the landlord finds out that there are actually four children living in the apartment.

For my present small apartment I have to pay \$140.00 per month. This is very difficult for me to pay for because my monthly income as a cashier-waitress is only about \$270.00 plus a welfare supplement which brings the total to \$443.12 per month. If I were living with the Housing Authority my rent would be less than \$100.00 per month. With lower rent I would have enough to buy my children more clothing and other necessities that I now cannot afford.

Since I have been on the waiting list of the Housing Authority for over a year, I am beginning to lose hope that they will ever be able to find a house for us unless new places with more bedrooms are built. If I am evicted, I fear that I may either have to send my children back to Arizona or move to a dangerous and dirty place in order to find another place to live.

/s/ Angie Duarte

Subscribed and sworn to before me this 16th day of August, 1969, at San Jose, California.

(Seal)

**/s/ Marina B. Fontanilla,
Notary Public in and for the
County of Santa Clara, Calif.**

My commission expires February 10, 1973.

Exhibit D

AFFIDAVIT

State of California
County of Fresno—ss.

Fergus P. Cambern, being sworn, says:

I am the executive director of both the housing authority for the County of Fresno and the housing authority for the City of Fresno. I'm also the secretary for the Board of Commissioners for both housing authorities. In my present position I have been able to watch the effect of Article 34 on our various programs.

In the City of Fresno the housing authority has 1,000 families on their waiting list. It is my opinion that this list would include more names if it were not for the size of the waiting list and the fact that people give up asking after they have been turned down for a long period of time. Under the city program, we have 966 units which were acquired or approved prior to the effective date of Article 34 (no new units have been built since 1954) and 369 units under lease. We also have authorization to lease 500 more units if we can find them within the city. All of our available units are occupied and there does not seem to be any way to obtain 1,000 units for the families on our waiting list.

Article 34 was, in my opinion, added to the California Constitution in order to stop the public housing program. It did just that in Fresno. We have attempted to have two referenda in the City of Fresno

and have been defeated in both. The first referenda, in 1962, was for 400 units. The second was for 1,000 units in April of 1969. In both cases the city council and the housing authority agreed that the additional units were desperately needed and that their construction and acquisition would benefit the city. Nevertheless, the voters decided that they would not approve the construction or acquisition. The ballot measure in April, 1969, proposed 1,000 units to be scattered throughout the city. The undercurrent of the opposition to the proposal was caused by fear by middle and upper income people that minority and low income families would be moved into their neighborhood.

Direct construction or acquisition is the only way the housing authority can take care of the segment of society that industry cannot afford to take care of. The leasing program will not take care of the increased need which results from deteriorating old housing and influx of new population. Rising construction costs and costs of land mean that the housing authority is expected to pay higher rent than it is authorized to pay.

/s/ Fergus P. Cambern

Subscribed and sworn to before me this 25th day of August, 1969, at Fresno, California.

(Seal)

/s/ Opal C. Grimes,
Notary Public in and for the
County of Fresno, Calif.

My commission expires June 1, 1973.

Exhibit E

AFFIDAVIT

State of California

County of Sacramento—ss.

Harry E. Zollinger, being sworn says:

I am the executive director for the Housing Authority of the City and County of Sacramento. I have held this position since April of 1968. As Executive Director I have responsibility for placing individuals and families of low income in safe, decent and adequate housing which is within their financial reach.

On the active waiting list as of July 15th, 1969, there were 2,862 family groups. The following represents the number of family groups waiting for the particular bedroom sizes specified:

Bedrooms	Family Groups
1	398
2	896
3	978
4	447
5	112
6	24
7 + bedrooms	7
Total	2,862

Article 34 has made it almost impossible for us to fulfill the need documented above because Article 34 requires a political campaign and low-income families are not attractive political candidates. We have only

been able to obtain referendum approval for 800 units for disabled and elderly persons. These units will help slightly with the 1 and 2 bedroom need expressed above, but will do nothing to help the larger family groups. There simply do not exist enough units to house the families on the active waiting list as well as those thousands who have not formally applied with the Housing Authority. There will be some new construction of approximately 200 units but with the rising interest rates and costs of construction, the Housing Authority cannot afford to pay the rental required by the developers to make a profit on the new construction. Even if this were not true, 200 units would only make a slight dent in the tremendous need for low-income housing that exists in our City and County.

The only way we can adequately meet our needs is to acquire or construct units directly with financial assistance from the Department of Housing and Urban Development. Article 34 is now effectively blocking our use of this assistance.

/s/ Harry E. Zollinger

Subscribed and sworn to before me this 19th day of August, 1969.

(Seal)

/s/ Lorraine V. Minisan,
Notary Public in and for the
County of Sacramento, Calif.
My commission expires April 14, 1972.

Exhibit F

RESOLUTION No. 28714

Resolution of the Council of the City of San Jose
Appointing Commissioners of the Housing Authority of the City of San Jose, and Directing the Mayor to Certify Said Appointments and to Designate the First Chairman.

Be It Resolved by the Council of the City of San Jose:

Whereas, the Council of the City of San Jose has hertofore adopted its Resolution No. 28614 wherein it determined, found and declared, in pursuance of the Housing Authorities Law as amended, that:

(a) Insanitary and unsafe inhabited dwelling accommodations exist in the City of San Jose, California;

(b) There is a shortage of safe and sanitary dwelling accommodations in the City of San Jose, California, available to persons of low income at rentals they can afford;

(c) There is need for a housing authority to function in the City of San Jose, California; and

Whereas, no Commissioners have as yet been appointed for said Housing Authority, and the first chairman of said commissioners has not as yet been designated; Now, Therefore:

Section 1. In pursuance of the authority vested in the Council of the City of San Jose, California, by

Sections 34270 and 34272 of the Housing Authorities Law as amended, the five (5) persons hereinafter named are hereby appointed to serve as Commissioners of the Housing Authority of the City of San Jose from the 31st day of January, 1966, for the number of years appearing after their names respectively, to wit:

David Reiser One year
Norman Mineta Two years
Charles Davidson Three years
Walter Rector Four years
Mary Boyce Four years

Section 2. The City Clerk shall promptly notify the Mayor of the City of San Jose, California, of the adoption of this resolution.

The Mayor of the City of San Jose, California, is hereby authorized and directed to issue a certificate evidencing the appointment of the above named Commissioners and to file said certificate in the office of the City Clerk of the City of San Jose, California.

The Mayor of the City of San Jose, California, is hereby requested to designate, pursuant to the provisions of Section 34277 of the Health and Safety Code of the State of California, the first chairman from among the above named Commissioners, to issue his certificate evidencing the designation of said first chairman, and to file said certificate in the office of the City Clerk of the City of San Jose, California.

Section 3. This resolution is adopted pursuant to the provisions of Sections 34270 and 34272 of the

Health and Safety Code of the State of California,
and shall be effective immediately.

Adopted This 31st day of January, 1966, by the
following vote:

Ayes: Councilmen—Fischer, James, Miller, Solari,
Walsh and Pace.

Noes: Councilman—Shaffer.

/s/ J. L. Pace

Void if detached.

The attached is a full, true and correct
copy of the original now on file in
my office.

Attest:

Francis L. Greiner, City Clerk
of the City of San Jose, Calif.

By: /s/ Margaret Marumoto, Deputy

Dated: Aug. 19, 1969.

Exhibit G**RESOLUTION No. 34642**

**Resolution of the Council of the City of San Jose
Confirming Canvass by Registrar of Voters of
Santa Clara County of Special Municipal Elec-
tion on Housing Referendum**

Whereas, the Registrar of Voters of Santa Clara County has duly canvassed the votes cast in the City of San Jose (hereinafter called the "City") at the special municipal election consolidated with the State of California General Election held on November 5, 1968, in the City, by the electors of the City upon the measure hereinafter set forth, and has certified to this Council the result of the votes cast at said election upon said measure, which said certification is now on file in the office of the City Clerk of the City,

Now, Therefore, Be It Resolved by the Council of the City of San Jose as follows:

1. Said canvass by said Registrar of Voters as shown by said certification and the result of said election is hereby ratified, confirmed and approved.
2. At said election the following measure was submitted to the electors of the City and the number of votes cast in the City for and against said measure was as follows:

MEASURE (B): (Housing Authority Measure)	Shall the Housing Authority of the City of San Jose have authority to develop, construct,	TOTAL VOTE
and acquire, in any manner selected by said Authority, a low rent housing project (as defined in Article XXXIV of the California Constitution), consisting of not more than one thousand dwelling units, subject to the following conditions: (1) not more than four such dwelling units shall be situate in any one structure, (2) not more than one structure containing any such dwelling unit shall be situate on any one lot, and (3) such dwelling units shall be dispersed among various sections of the City so that not more than twenty-four such dwelling units shall be situate within a radius of fifteen hundred feet from any other such dwelling unit.	YES	57,896
	NO	TOTAL VOTE 68,527

This measure was ordered placed on the ballot by Resolution No. 34036 (note 4 aye and 1 nay—James, Mineta and Colla, for—Shaffer, against).

3. The total number of votes cast in the City at said special municipal bond election and the total number of votes given in each precinct and by absentee voters of the City for and against said measure was and is set forth in said canvass by said Registrar of Voters.

Adopted this 2nd day of December, 1968 by the following vote:

Ayes: Councilmen—Colla, Lisher, Mineta, Shaffer,
Solari, James.

Noes: Councilmen—None.

Absent: Councilmen—Miller.

Mayor
Ronald R. James

Attest:

City Clerk
Francis L. Greiner

Void if detached

The attached is a full, true and correct
copy of the original now on file in
my office.

Attest:

Francis L. Greiner, City Clerk
of the City of San Jose, Calif.

By: /s/ Margaret Marumoto, Deputy

Dated: Aug. 19, 1969.

Exhibit H

AFFIDAVIT

State of California
County of Santa Clara—ss.

Tyr V. Johnson, being sworn, says:

I am a Commissioner of the Housing Authority of Santa Clara County. Since the Housing Authority began operations in April, 1968, it has received 2,469 requests for housing assistance up to the end of July, 1969. It has provided housing for about 1/5 of those needing assistance. It has been unable to lease units to meet the need of the other 4/5 of the applicants. There are simply not enough dwelling units for the need in Santa Clara County. Hundreds more are needed for low-income families, but the Authority cannot rehabilitate, build or buy without going to a referendum as required by Article 34 of the state constitution.

The probabilities of success in a county-wide referendum campaign are very small indeed since it would require the concurrence of 14 separate city councils some of which do not even permit the Authority to lease within their boundaries let alone acquire. The acute need for more housing for low-income families is not being met by the private building industry, nor is it apt to be. Only by means of the "conventional" Housing Authority program of buying or building or rehabilitating will the supply of housing specifically for low-income families be increased.

The requirement imposed since 1950 by Article 34 that approval of the majority affluent community be obtained before any Federal funds are allowed to be used to increase the supply of housing for the minority low-income families effectively blocks the Housing Authority from carrying out its charge.

Quite aside from the fiscal aspects of the "conventional" programs, the referendum requirement provides an opportunity for the expression of the same racist attitudes as were so successfully marshalled in the passage of Proposition 14. In Santa Clara County the major ethnic minority is the Mexican-American Community with about 9.5% of the total population while Negroes account for only slightly more than 1% of the population. Nonetheless white race hostility can be successfully focused on this minority and expressed by a no vote on any proposition to assist them.

Only because the State Attorney General ruled that the leasing program of the 1965 Housing Act did not require a referendum was it possible to move the Board of Supervisors to activate a County Housing Authority in 1968 and then only after a year long campaign by advocates despite the unanimous recommendation of the Board's own Health and Welfare Commission and the example of the City of San Jose Housing Authority's successful leasing program. Had a referendum been required for the activation of the County Housing Authority, it is highly probable that there would be no Authority now with its limited leasing program to try and cope with the acute problem

of "providing decent, safe, and sanitary housing to all eligible families."

Until the Authority gains the legal power to increase the number of dwelling units specifically for low-income families, by rehabilitation, construction or purchase with available Federal funds thousands of eligible low-income families and elderly people will go without decent housing. Article 34 effectively blocks reaching that goal.

/s/ Tyr V. Johnson

Subscribed and sworn to before me this 24th day of August, 1969.

(Seal)

/s/ Marina B. Fontanilla,
Notary Public for the County
of Santa Clara, Calif.

My commission expires February 10, 1973.

Appendix A

PUBLIC HOUSING REFERENDA
THRU JUNE 14, 1968

Location	Housing Authority	No. of Units	VOTE		W-W L-L
			For	Against	
1951					
Broderick	Yolo County	50	194	80	W
Esparto	Yolo County	16	140	25	W
Gonzales	Monterey County	50	153	93	W
Knights Landing	Yolo County	10	98	13	W
Soledad	Soledad	50	197	35	W
Yolo	Yolo County	10	73	24	W
(Cacheville precinct)					
1952					
Hughson	Stanislaus Co.	30	125	203	L
Live Oak	Sutter County	30	198	211	L
Live Oak	Sutter County	30	318	270	W
Los Angeles	Los Angeles	10,000	264,431	388,682	L
Oakley	Contra Costa Co.	40	56	118	L
Patterson	Stanislaus Co.	40	100	139	L
1953					
Thornton	San Joaquin Co.	50	112	15	W
Thornton (FLC)	San Joaquin Co.	50	100	23	W
1954					
None					
1955					
Calexico	Imperial Co.	30	133	102	W
Oroville	Butte Co.	100	243	586	L
Oxnard	Oxnard	160	1,908	708	W
1956					
Biggs	Butte County	20	97	40	W
Calipatria	Calipatria	40	143	35	W
Cutler	Tulare County	30	191	41	W
East Nicolaus	Sutter County	10	20	26	L
Fort Bragg	Mendocino County	50	265	331	L
Fort Bragg	Mendocino County	50	788	828	L
Gridley	Butte County	30	289	224	W

Location	Housing Authority	No. of Units	VOTE		W-Won L-Lost
			For	Against	
Guadalupe	Santa Barbara Co.	20	315	43	W
Marin County	Marin County	300	28,467	16,645	W
North Richmond	Contra Costa Co.	150	278	106	W
Oakley	Contra Costa Co.	30	96	71	W
Patterson	Stanislaus Co.	30	364	149	W
Stockton	San Joaquin Co.	300	12,533	9,644	W
Sutter	Sutter County	20	52	208	L
Tracy	San Joaquin Co.	60	1,725	1,178	W
Tudor	Sutter County	20	35	35	L
Willits	Mendocino Co.	60	298	209	W
Yuba City	Sutter County	200	1,029	1,072	L
1957					
None					
1958					
Chico	Butte County	100	2,893	1,730	W
El Medio	Butte County	100	156	258	L
Firebaugh	Fresno County	40	271	47	W
Lompoc	Santa Barbara Co.	50	935	297	W
Oxnard	Oxnard	70	5,828	1,984	W
Port Hueneme	Port Hueneme	20	1,068	477	W
Ripley	Riverside Co.	50	83	37	W
Ventura	San Buenaventure Co.	80	8,031	2,024	W
1959					
Alisal	Monterey County	100	368	1,659	L
Broderick	Yolo County	26	252	219	W
Bryte	Yolo County	26	107	180	L
Huron	Fresno County	20	42	12	W
Mendota	Fresno County	50	74	12	W
Port Chicago	Contra Costa Co.	20	149	131	W
Rodeo	Contra Costa Co.	250	826	394	W
Winters Area	Yolo County	26	88	21	W
Woodland Area	Yolo County	72	87	5	W
Yuba City	Sutter County	100	358	868	L
1960					
Barstow	San Bernardino Co.	80	668	1,109	L
Calexico	Calexico	30	168	238	L
Eureka	Eureka	60	5,771	4,810	W
Richland	Sutter County	100	203	168	W
Stockton	San Joaquin Co.	200	12,999	12,050	W

Location	Housing Authority	No. of Units	VOTE		W-Vn L-Ln
			For	Against	
Thornton	San Joaquin Co.	25	114	127	L
Tracy	San Joaquin Co.	40	2,220	1,882	W
1961					
Ceres	Stanislaus Co.	30	172	67	W
Colton	San Bernardino Co.	40	903	606	W
Cutler	Tulare County	25	138	81	W
Fontana	San Bernardino Co.	60	1,025	1,308	L
Gonsalves	Monterey County	50	222	85	W
Goshen	Tulare County	20	61	56	W
Half Moon Bay	San Mateo County	50	183	93	W
Kings County	Kings County	275	3,393	3,162	W
Marin County	Marin County	300	5,799	8,461	L
New London	Tulare County	30	68	26	W
Oxnard	Oxnard County	150	4,021	2,066	W
Parlier	Fresno County	50	144	28	W
Richmond	Richmond	150	6,261	3,355	W
San Pablo	San Pablo	40	678	278	W
Stockton	San Joaquin County	100	5,326	10,015	L
Ventura	San Buenaventura Co.	75	8,330	2,100	W
1962					
Delano	Kern County	16	1,509	1,265	W
Dinuba	Tulare County	80	555	136	W
Fresno	Fresno City	400	10,375	25,784	L
Gridley	Butte County	20	487	385	W
Guadalupe	Santa Barbara Co.	20	145	49	W
Los Banos	Merced County	40	1,033	483	W
McFarland	Kern County	40	286	361	L
Orange Cove	Fresno County	40	205	48	W
San Bernardino	San Bernadino Co.	300	6,282	7,455	L
San Luis Obispo	San Luis Obispo	120	2,967	4,479	L
Santa Maria	Santa Barbara Co.	150	3,124	1,679	W
Soledad	Soledad	26	193	248	L
Wasco	Wasco	100	637	1,096	L
Westley	Stanislaus Co.	20	82	26	W
Williams	Williams	20	120	307	L
1963					
Blythe	Riverside Co.	100	188	292	L
Calexico	Calexico	50	240	169	W
Del Rey	Fresno County	40	69	7	W
Mendota	Fresno County	50	279	77	W
Reedley	Fresno County	20	263	243	W

Location	Housing Authority	No. of Units	VOTE		W-Won
			For	Against	L-Lost
1964					
Marin County	Marin County	200	47,774	18,256	W
Martinez	Contra Costa Co.	50	1,881	756	W
Merced	Merced County	160	544	1,039	L
Oakley	Contra Costa Co.	40	612	227	W
San Francisco	San Francisco	2,500	140,906	115,483	W
South Dos Palos	Merced County	24	83	4	W
West Pittsburg	Contra Costa Co.	50	2,093	533	W
1965					
Barstow	San Bernardino Co.	250	1,342	998	W
Blythe	Riverside Co.	100	60	97	L
Firebaugh	Fresno County	30	102	19	W
Laton	Fresno County	20	115	90	W
San Pablo	San Pablo	150	419	569	L
Stockton	San Joaquin Co.	220	12,465	16,908	L
1966					
Biola	Fresno County	24	44	38	W
Crescent City	Crescent City	200	127	218	L
Eureka	Eureka	100	3,300	4,688	L
Huron	Fresno County	40	62	21	W
McFarland	Kern County	60	436	282	W
Oakland	Oakland	2,500	60,692	55,686	W
Pacifica	San Mateo Co.	200	1,834	2,993	L
Pacifica	San Mateo Co.	200	3,609	4,213	L
Port Hueneme	Port Hueneme	60	887	389	W
Quincy	Plumas County	50	274	683	L
San Joaquin	Fresno County	30	54	25	W
Tracy	San Joaquin Co.	40	2,490	1,838	W
1967					
New London	Tulare County	10	44	14	W
Pinedale	Fresno County	85	96	84	W
Riverbank	Riverbank	30	224	61	W
Traver	Tulare County	10	37	5	W
1968					
Malaga	Fresno County	50	27	36	L
San Luis Obispo	San Luis Obispo	120	5,728	2,962	W

Source: California Department of Housing and Development, August 8, 1968.

Appendix B

PUBLIC HOUSING UNITS PER 1,000 LOW-INCOME POPULATION

A	B	C	D	E	F
State	Low-1 Income Population (in 1,000s)	Per Cent of U.S. Low-Inc. Population	Total Units (including pre-con- struction):	Total Units per 1,000 Low-Income Population	Per Cent of U.S. Units
U.S.	18,935	100	814,965	43.1	100
Cal.	1,530	8	35,804	23.4	4
Ill.	847	4	61,851	73.1	8
Mass.	456	2	23,547	62.6	4
Mich.	633	3	18,184	28.7	2
New Y.	1,500	8	100,026	66.7	12
Ohio	815	4	35,200	43.2	4
Pa.	1,019	5	61,195	60.1	7
Tex.	1,180	6	43,099	36.5	5

¹United States Census, Characteristics of Population: 1960.

²HUD: Summaries of Low-rent Housing Programs, including units in pre-construction (except where otherwise noted), 12-31-67.

[Title of Court and Cause]

ANSWER

Defendants the Housing Authority of the City of San Jose, Rodmar H. Pulley, Mary R. Boyce, Walter Rector, David Reiser, Allen Bellandi and Sam Obregon, for answer to the complaint on file herein, admit, deny and allege as follows:

1. Admit the allegations contained in paragraphs 1, 10, 11, 12, 13, 14, 15, 16, 19, 22, 23, 24, 27, and 35.

2. Deny the allegations contained in paragraphs 2, 3, 18, 25, 28, 29, 31, 32 and 34.

3. Defendants are without sufficient information or belief to admit or deny the allegations of paragraphs 4, 5, 6, 7, 8, 9 and 20, and basing their denial thereon, deny each and every allegation contained therein.

By way of further answer, defendants allege as follows:

For First Defense—Parties

4. Defendants Mary Boyce, Walter Rector, David Reiser, Allen Bellandi, Sam Obregon and Rodmar H. Pulley are incorrectly sued herein as individuals and not solely in their official capacity as board members and executive director. Defendant Rodmar H. Pulley is no longer executive director and has not been since October 15, 1969.

Second Defense—Valid Reservation of Power

5. These defendants are bound by the provisions of Article XXXIV of the California Constitution in that there is no obligation or requirement that the People of the State of California participate in Federally assisted housing owned by Housing Authorities, and the people of the State of California have, by a

valid exercise of their sovereignty, limited and reserved their grant of power and authority to defendants to participate in Federally assisted housing to those situations in which the local electorate has, by majority vote in a referendum, approved such participation where a Housing Authority acquires and owns real property.

Third Defense—Relief Sought

6. The relief sought by plaintiffs is beyond the jurisdiction of the court in that it seeks not only a declaration of the invalidity of California Constitution § XXXIV but also seeks to direct the defendant Board of Directors of the Housing Authority of the City of San Jose to exercise its discretion in a particular way, that is, to compel it to proceed to acquire housing without first deliberating, holding such hearings as it deems appropriate, and without providing that Board with the opportunity to exercise that discretion which it is obliged to exercise.

Wherefore, defendants and each of them pray for judgment as follows:

1. That plaintiffs take nothing by their complaint;
2. for costs of suit; and,
3. for such other and further relief as the Court deems just.

Dated: October 23, 1969.

/s/ Robert S. Sturges

Attorney for Defendants the Housing
Authority of the City of San Jose and
its Board of Directors

(Proof of Service omitted)

[Title of Court and Cause]

REQUEST FOR ADMISSIONS

Plaintiffs and each of them request defendants and each of them within ten days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissability which may be interposed at the trial:

I. That each of the following documents, attached to the complaint in the above entitled matter, is genuine:

1. Exhibit F, a copy of resolution number 28714.
2. Exhibit G, a copy of resolution number 34642.
3. Appendix B, statistics from the United States census, characteristics of population of 1960 and from HUD: summaries of low-rent housing programs including units in pre-construction (except where otherwise noted) 12-21-67 and other information contained in that appendix.

II. That the following document, attached to this Request for Admissions, is genuine:

1. A copy of resolution number 28614.

III. The following statements are true:

1. The named plaintiffs are all citizens of the United States of America.
2. The named plaintiffs are all residents of the city of San Jose.
3. The named plaintiffs are all of low income.
4. The named plaintiffs all reside in unsafe, unsanitary or crowded housing.
5. The named plaintiffs are all on the waiting list of the Housing Authority of the City of San Jose.
6. The named plaintiffs have all been on the waiting list of the Housing Authority of the City of San Jose for more than one year.
7. Plaintiff Anita Valtierra and her seven minor children live in a one-bedroom apartment.
8. Plaintiff Valtierra and her seven minor children live in an apartment owned by the City of San Jose.
9. The Valtierra family was on the emergency list of the Housing Authority of the City of San Jose approximately one year ago.
10. Emergency cases are defined by the Housing Authority of the City of San Jose as only those cases where the family is totally without housing.
11. Plaintiff Dorether Anderson and her eight children live in a three bedroom, one bathroom, home.

12. Plaintiff Dorether Anderson has been on the waiting list of the Housing Authority of the City of San Jose continuously since November, 1966.
13. The Housing Authority of the City of San Jose is a public entity.
14. The Housing Authority of the City of San Jose was established pursuant to California Health and Safety Code section 34200 *et seq.*
15. Defendants Boyce Rector, Reiser, Bellandi and Obregon are duly appointed commissioners of the Housing Authority of the City of San Jose.
16. The Housing Authority of the City of San Jose will not make application to HUD for a preliminary loan unless and until the proposal is approved by the electorate in accordance with Article 34 of the California Constitution.
17. The City Council of the City of San Jose is the governing body of the City of San Jose.
18. Defendants James, Mineta, Shaffer, Colla, Hays, Goglio, and Gross are the duly elected councilmen of the City Council of the City of San Jose.
19. The City Council of the City of San Jose will not approve any application for a preliminary loan unless a successful referendum approving the construction of low income housing has been accomplished pursuant to Article 34 of the California Constitution.

20. The City Council of the City of San Jose will not approve any contracts for the construction of public housing in San Jose unless and until the proposal is approved by the electorate in accordance with Article 34 of the California Constitution.
21. Defendant George Romney, acting in his official capacity, will refuse to approve the use of federal funds to aid the construction of new public housing units in San Jose unless and until the proposal is approved by the electorate in accordance with Article 34 of the California Constitution.
22. At the time that the Housing Authority of the City of San Jose was activated, it was found by resolution of the City Council that there was a need for a Housing Authority to function within the City of San Jose.
23. There is an acute housing shortage in the City of San Jose.
24. This housing shortage is especially burdensome for the poor since the cost of rental units has increased dramatically in the past few years.
25. Much of the older housing in the City of San Jose is deteriorating and can no longer be used.
26. The only way that the housing shortage can be alleviated is to construct new units.

27. The cost of construction of new units is so high that low-income families cannot afford to participate in new construction without financial assistance.
28. The Housing Authority's waiting list has been increasing each month.
29. There are presently more than 729 eligible families on the waiting list.
30. The reason the 1,000 units requested in the November, 1968 election were to be scattered throughout the City was to avoid racial and economic segregation.

/s/ Diane V. Delevett
 Attorney for Plaintiffs
 22 Martin Street
 Gilroy, California 95020

RESOLUTION No. 28614

**Resolution of the Council of the City of San Jose
Declaring the Need for a Housing Authority in
the City of San Jose, California.**

Be It Resolved by the Council of the City of San Jose:

SECTION 1. The Council of the City of San Jose, California, hereby determines, finds and declares, in pursuance of the Housing Authorities Law as amended, that:

(a) Insanitary and unsafe inhabited dwelling accommodations exist in the City of San Jose, California;

(b) There is a shortage of safe and sanitary dwelling accommodations in the City of San Jose, California, available to persons of low income at rentals they can afford;

(c) There is need for a housing authority to function in the City of San Jose, California.

SECTION 2. The City Clerk shall promptly notify the Mayor of the City of San Jose, California, of the adoption of this resolution.

SECTION 3. This resolution is adopted pursuant to the provisions of Section 34242 of the Health and Safety Code of the State of California, and shall be effective immediately.

Adopted this 17 day of January, 1966 by the following vote:

James, Miller, Solari, and Pace.

/s/ J. L. Pace

Mayor

J. L. Pace, M.D.

Void if detached

The attached is a full, true and correct copy of the original now on file in my office.

Attest:

Francis L. Greiner, City Clerk of the City of San Jose, Calif.

By: /s/ Margaret Marumoto, Deputy

Dated: Aug. 19, 1969

Article XXXIV
Proposed
AMENDMENTS TO
CONSTITUTION
PROPOSITIONS AND
PROPOSED LAWS
TOGETHER WITH ARGUMENTS

To Be Submitted to the Electors
of the State of California at the

GENERAL ELECTION
TUESDAY, NOV. 7, 1950

Compiled by RALPH N. KLEPS, Legislative Counsel
Distributed by FRANK M. JORDAN, Secretary of State

CERTIFICATE OF SECRETARY OF STATE

**State of California, Department of State
Sacramento, California**

I, Frank M. Jordan, Secretary of State of the State of California, do hereby certify that the following measures will be submitted to the electors of the State of California at the general election to be held throughout the State on the seventh day of November, 1950.

Witness my hand and the great seal of the State, at office in Sacramento, California, the first day of September, A.D. 1950.

(Seal)

Frank M. Jordan

Secretary of State

Public Housing Projects. Requiring Election to Establish.	
Initiative Constitutional Amendment. Adds Article XXXIV to Constitution. Requires approval of majority of electors of county or city, voting at an election, as prerequisite for establishment of any low-rent housing project by the State or any county, city, district, authority, or other state public body. Defines low-rent housing project as living accommodations for persons of low income financed or assisted by Federal Government or state public body. Exempts any project subject to existing contract between state public body and Federal Government.	YES
10	NO

(For full text of measure, see page 9, Part II)

Analysis by the Legislative Counsel

This constitutional amendment prohibits the development, construction, or acquisition of any low-rent housing project by the State, or any city, city and county, county, district, authority, agency or other subdivision or public body of the State until ap-

proved by a majority vote of the electors of the city, town, or county in which the project is to be located.

“Low-rent housing project” is defined as any development composed of urban or rural dwellings, apartments, or other living accommodations for persons of low income, financed in whole or in part by the United States or any of its agencies or instrumentalities, or by the State or any of its agencies or public bodies, or to which the Federal Government or the state public body extends assistance by supplying labor, guaranteeing the payment of liens, or otherwise, except where a contract for financial assistance between any state public body and the Federal Government in respect to such project is in existence on the effective date of the amendment.

“Persons of low income” means persons or families who lack the income necessary (as determined by the state public body developing, constructing, or acquiring the project) to enable them without financial assistance to live in decent, safe, and sanitary dwellings, without overcrowding.

The amendment would be self-executing, but legislation to facilitate its operation may be enacted.

*Argument in Favor of Initiative
Proposition No. 10*

A “yes” vote for this proposed constitutional amendment is a vote neither for nor against public housing. It is a vote for the future right to say “yes” or “no” when the community considers a public housing project.

Passage of the "Public Housing Projects Law" will restore to the citizens of a city, town, or county, as the case may be, the right to decide whether public housing is needed or wanted in each particular locality. Such is not the case at present.

Time after time within the past year, California communities have had public housing projects forced upon them without regard either to the wishes of the citizens or community needs. This is a particularly critical matter in view of the fact that the long-term, multimillion-dollar public housing contracts call for tax waivers and other forms of local assistance, which the Federal Government says will amount to half the cost of the federal subsidy on the project as long as it exists.

For government to force such additional hidden expense on the voters at a time when taxation and the cost of living have reached an extreme high is a "gift" of debatable value. It should be accepted or rejected by ballot.

If, on the other hand, certain communities are in such dire need of housing that the cost of long-term subsidization is deemed worth while, local voters, who best know that need, should have the right to express their wishes by ballot.

In either case, a "yes" vote for this proposed amendment will strengthen local self-government and restore to the community the right to determine its own future course.

Furthermore, the financing of public housing projects is an adaptation of the principle of the issuance

of revenue bonds. Under California law, revenue bonds, which bind a community to many years of debt, cannot be issued without local approval given by ballot. Public housing and its long years of hidden debt should also be submitted to the voters to give them the right to decide whether the need for public housing is worth the cost.

A "yes" vote for the "Public Housing Projects Law" is a vote for strong local self-government. It is an expression of confidence in the community's future and in the democratic process of government. To strengthen the grass roots democracy which has made America protector of the world's free peoples, vote "yes" on the Public Housing Projects Law.

Earl Desmond

State Senator Sacramento County

Frederick C. Dockweiler

*Argument Against Initiative
Proposition No. 10*

This proposition should be defeated because: (1) it is wholly unnecessary; (2) it is contrary to firmly establish principles of American representative government; (3) if adopted, it would be impossible to act expeditiously in times of emergency; (4) it would substantially increase the tax load in cities and counties of the State.

There is no necessity for a constitutional amendment such as here proposed, prohibiting the development, construction and acquisition of low-rent housing projects without submission of the issue to the

vote of the people in general or special elections to be held for the particular purpose in each city, town, or county of the State. This would be time-consuming and expensive. (A single special election in the City of Los Angeles would cost \$400,000.) The total cost to taxpayers of the State for holding special elections would be staggering.

California now has an adequate statute relating to the subject—"The California Housing Authorities Law, Act 3483"—which provides that no low-rent housing project can be undertaken "until the governing body of the city or county * * * approves said project by resolution duly adopted." This law was passed in 1938 and has been amended several times.

If the proponents of this measure desire to change the legal procedure for local approval of low-rent housing projects, they should make their recommendations to the Legislature and ask for amendment of the law rather than freeze into the State Constitution (already too voluminous) provisions relating to local governmental administrative procedure.

The people already have adequate control through election of their representatives in the State Legislature, city councils, and boards of supervisors, and through the exercise of the initiative, referendum and recall.

This proposed measure is an attempt to discourage the construction of new low-rent housing projects (in which veterans have preference) by setting up a slow, cumbersome and costly procedure to make use of federal funds that would in any event be expended

in other states without in any way benefiting taxpayers of California.

In a national emergency it may become necessary to quickly provide housing for industrial workers in certain areas. In the event of an atomic bomb attack emergency housing would have to be provided immediately for local residents. Elected representatives of the people in the State Legislature, in city councils and boards of supervisors should be free to act promptly to meet pressing needs in any contingency, rather than be placed in a legal straitjacket.

This proposed constitutional amendment is not in the public interest. Vote no on Proposition No. 10.

Chris N. Jespersen

State Senator, Twenty-ninth District

C. J. Haggerty, Secretary

California State Federation of Labor
(A.F. of L.)

Fletcher Bowron,

Mayor of the City of Los Angeles

[Title of Court and Cause]

ADMISSIONS OF DEFENDANT HOUSING AUTHORITY OF THE CITY OF SAN JOSE

Defendant Housing Authority of the City of San Jose and the individual members of the Board of said Housing Authority hereby respond to the Request for Admissions heretofore filed by plaintiffs as follows:

In response to Request to Admission No. I, these defendants admit each and every request for admission set forth herein.

These defendants admit that the document designated in Request No. II is genuine.

These defendants admit that all of the statements listed in Request are true with the exception of Statements Number 10, 19, 26, 29 and 30.

In answer to Request No. 10, it is true that emergency cases are defined by the Housing Authority of the City of San Jose as those cases where the family is totally without housing, but also the definition includes those cases where the applicant is about to be without housing by the reason of having received a vacate, foreclosure, or eviction notice, or where he is paying more than fifty per cent of his net income for rent.

In answer to question 19, it is not known by these defendants whether it is appropriate or required that City Council of the City of San Jose approve any application for a *preliminary loan* unless a successful referendum has first been held.

In answer to question 26, it is true that one reasonable and practical way to alleviate the existing housing shortage is the construction of new units, but these defendants would not admit that this is the only way to alleviate that shortage.

In answer to question #29, there are presently 779 families on the waiting list of the Housing Authority of the City of San Jose.

In answer to question 30, it is admitted that one of the reasons and bases for the November, 1968 election requesting authorization for 1000 units which were to be scattered throughout the city was to avoid racial and economic segregation, that consideration being one of several bases.

Dated: November 18, 1969

Robert S. Sturges

[Title of Court and Cause]

RESPONSE TO REQUEST FOR ADMISSIONS

Come now the defendants Ronald James, Norman Y. Mineta, Joseph Colla, Walter V. Hays, David J. Goglio and Kurt Gross, and each of them, and for their Response to the Request for Admissions on file herein, admit or deny as follows:

(1) Admit the genuineness of the documents attached to the Complaint as Exhibits F and G as set forth in Request Numbers I 1 and I 2 and attached to the Request as Resolution Number 28614 as referred to in Request II 1.

(2) Cannot truthfully admit or deny the genuineness of the document set forth in Request Number I 3 for the reason that neither any of the defendants nor any of their employees, agents or attorneys have any knowledge of said matters.

(3) Cannot truthfully admit or deny the matters set forth in Request Numbers III 1 through III 6, inclusive, III 9 through III 12, inclusive, III 21, and III 23 through 29, inclusive, for the reason that neither any of the defendants nor any of their employees, agents or attorneys have any knowledge of said matters.

(4) Admit the truth of the matters set forth in Request Numbers III 7 and III 8, III 13 through III 20, inclusive, III 22 and III 30.

Dated: November 12, 1969.

(Perjury Affidavits omitted)

[Title of Court and Cause]

RESPONSE TO REQUEST FOR ADMISSIONS

Come now the defendant, Virginia C. Shaffer, and for her Response to the Request For Admissions on file herein, admits or denies as follows:

(1) Admits the genuineness of the documents attached to the Complaint as Exhibits F and G as set forth in Request Numbers I 1 and I 2 and attached to the Request as Resolution Number 28614 as referred to in Request II 1.

(2) Cannot truthfully admit or deny the genuineness of the document set forth in Request Number I 3 for the reason that neither any of the defendants nor any of their employees, agents or attorneys have any knowledge of said matters.

(3) Cannot truthfully admit or deny the matters set forth in Request Numbers III 1 through III 12, inclusive, III 21, and III 23 through 30, inclusive, for the reason that neither any of the defendants nor any of their employees, agents or attorneys have any knowledge of said matters.

(4) Admits the truth of the matters set forth in Request Numbers III 13 through III 20, inclusive, and III 22.

Dated: November 18, 1969.

(Perjury Affidavit omitted)

[Title of Court and Cause]

**AFFIDAVIT OF
FRANKLIN MILES LOCKFELD**

State of California

County of Santa Clara—ss.

Franklin Miles Lockfeld, being first duly sworn, deposes and says:

I am a Senior Planner in the County Planning Department for Santa Clara County. Since April of 1969, I have been working on the United States Department of Housing and Urban Development, California Project P-348 pursuant to §701 of the Housing Act of 1954 as amended. As a result of my research for this project, I know the following facts to be true in Santa Clara County.

The housing market in Santa Clara County has acted unfavorably for low and moderate income families in both home ownership and rental opportunity. There is a shortage of homes valued at less than \$24,000.00. This is caused in part by families with higher incomes living in houses valued at less than twice their annual income (which is the normal ratio of cost of house to income). It is also caused by the fact that single family housing stock has appreciated approximately 28% since 1960. Houses in some areas have appreciated nearly 50%. In 1969 the \$20,000.00 or less price bracket for new housing almost does not exist. In addition, only 13% of the 59,000 single-unit houses built since 1960 are now valued at less than \$20,000.00. The housing that is least sound is found in the \$15,000.00 or less bracket. This is also the tightest market since families with income of \$7,500 or less are able to afford only this kind of housing.

The average sales price of FHA new insured housing in the last one-quarter of 1968 was \$25,400.00. The average monthly expense for the purchase of such a home is \$245.00. A required income of approximately \$14,000.00 is necessary. For used housing a yearly income of approximately \$13,000.00 is necessary. The problem for low-income groups is also heightened by the fact that they cannot generally receive FHA assistance for new housing. In 1965, over 20% of the FHA insurance mortgages were made to families with income of less than \$8,000.00. In 1967 this same 20% went to families with income of less than \$10,000.00. In the 1966 census, 65% of the population of the County had less than \$10,000.00 annual income; 45% had less than \$8,000.00 annual income.

As to rentals, 25% of monthly income is generally regarded as the maximum people should need to pay for rent. There are now approximately 20,000 rental households with incomes of less than \$5,700.00 who are living in units costing more than 25% of their income. Rents have also drastically increased between 1964 and 1969: one bedroom apartments went from \$96.00 to \$146.00; studio apartments went from \$72.00 to \$127.00; two bedroom apartments went from \$117.00 to \$165.00 and three bedroom or more went from \$146.00 to \$186.00. Over 60% of the apartment house managers interviewed in a vacancy study conducted jointly with San Jose School of Business in March, 1969, had raised rents in the last 6 months. In addition, unsound apartment units are more often found in the \$120.00 per month or less bracket (nearly one-quarter unsound) where the demand is greatest

for families with income of less than \$5,800.00 per year.

Neither the County Housing Authority nor the City Housing Authority has succeeded in finding enough units to reach the authorized limits set by Housing and Urban Development. A total of 1933 units are now leased, 1071 additional families are eligible for housing, and 782 are pending eligibility clearance.

In order to have normal mobility in the society for people wishing to rent and purchase you need vacancy rates of 5% for single family units and 7-8% for apartments. To get these rates Santa Clara County needs an additional 5,000 multi-family rental units, 2,100 single family units for rent, and 6,800 single family units for purchase.

In 1966 over 40,000 households had income below \$4,000.00 (15% of the County population). Based on the 1966 census figures for income and the 1969 entrance levels of income for the San Jose Housing Authority, an estimated 19,500 households would be eligible for housing provided by the Authority in the City of San Jose alone. In other parts of the County an additional 20,000 were under entry level income limits for the County Housing Authority in 1966. Because of the housing situation, economic segregation has occurred. Low income families have gone to the valley floor, higher income families to the foothills. The low-income areas are closely related to the areas of concentration of minority residents and high income areas are closely related to the nearly all white sections of the community. Racial and ethnic groups constitute approximately 14% of the county popula-

tion. In 1966 one-third of the population lived in areas of less than 5% minority residents and 60,000 families lived where minorities constituted over one-third of the population. The economic and racial segregation has also left the minority groups and the poor groups in the most delapidated housing. In 1960 only 5% of the units occupied by white-non-Mexican-Americans were in a delapidated or deteriorated condition, while 23% of the units occupied by Mexican-Americans and 20% of the units occupied by non-whites were in delapidated or deteriorated condition. Minorities were thus over represented in the less than standard housing by greater than four to one and occupied nearly one-third of the deteriorating and dilapidated housing in the County in 1960.

Housing units occupied by minorities also tended to be far less adequate to their needs than units occupied by white households. A standard measure of housing occupancy is the person per room ratio; densities greater than 1.0 representing conditions of overcrowding. The 1960 census indicated that while less than 6% of the white households were thus overcrowded, nearly 30% of Mexican-American households, and over 17% of non-white households, had persons per room ratios of 1.01 or more.

/s/ Franklin Miles Lockfeld

Subscribed and sworn to before me this 19th day of November, 1969.

(Seal)

/s/ Marilyn B. Ott,
Notary Public in and for the
County of Santa Clara, Calif.
My commission expires March 3, 1973.

[Title of Court and Cause]

ANSWER AND REQUEST FOR JURY TRIAL

Defendants Ronald James, Virginia C. Shaffer, Joseph Colla, Walter V. Hays, sued incorrectly herein as Walter V. Hayes, David J. Goglio, sued incorrectly herein as David G. Goglio and Kurt Gross, sued incorrectly herein as Kirk Gross, for Answer to the Complaint on file herein, admit, deny and allege as follows:

I

Admit the allegations of the first two sentences contained in paragraph 1. Defendants are without sufficient information or belief to admit or deny the allegations of the last sentence of paragraph 1, and basing their denial thereon, deny each and every allegation contained therein.

II

Deny each and every, all and singular, allegation contained in paragraphs 2, 3, 17, 18, 25, 26, 28, 29, 31, 32, 34 and 35.

III

Defendants are without sufficient information or belief to admit or deny the allegations of paragraphs 4, 6, 7, 8, 9, 20 and 21, and basing their denial thereon, deny each and every allegation contained therein.

IV

Admit the allegations of the first sentence contained in paragraph 5. Defendants are without sufficient information or belief to admit or deny the

allegations of the remaining sentences of paragraph 1, and basing their denial thereon, deny each and every allegation contained therein.

V

Admit the allegations contained in paragraphs 10, 11, 12, 13, 14, 15, 16, 19, 22, 23, 24 and 27.

VI

By way of Answer to the allegations contained in paragraphs 30 and 33, defendants refer to their Answers to paragraphs 1-25, inclusive, and to paragraphs 27 and 29, incorporating said Answers herein as if they were set out at length.

By way of further Answer, defendants allege as follows:

First Affirmative Defense

VII

Defendants are incorrectly sued herein as individuals and not solely in their representative capacity as Council Members and as Mayor of the City of San Jose.

Second Affirmative Defense

VIII

Article XXXIV of the California Constitution is constitutional under the Federal Constitution and Federal law in that it is a valid exercise of the State sovereignty by the People of the State of California for such People to limit and reserve their grant of power and authority to defendants to develop, con-

struct or acquire a low-rent housing project without the prior approval of a majority of the local electorate.

Third Affirmative Defense

IX

Article XXXIV of the California Constitution is constitutional under the Federal Constitution and Federal law in that said article deprives no one of any existing Federal right, immunity or privilege.

Fourth Affirmative Defense

X

Article XXXIV of the California Constitution is constitutional under the Federal Constitution and Federal law in that no local governmental entity or State agency is under any Federal duty either (1) to provide a low-rent housing project in its community, or (2) in the event such local government or State agency wishes to provide such a project, to do so without first seeking the approval of a majority of the local electorate.

Fifth Affirmative Defense

XI

Even if the singling out of "low-rent" housing projects for persons of low income" by Article XXXIV is an invidious classification and a deprivation of equal protection under the XIV Amendment of the Federal Constitution to persons in such classification, nevertheless, the intent of the People of California to preserve such majority vote approval

prior to the development, construction or acquisition of *any* housing project by any local government or State agency is demonstrated by the inclusion of a severability clause in said Article. Hence, in any event defendants are still obligated under the provisions of said Article XXXIV to first seek the approval of a majority of the local electorate prior to the development, construction or acquisition of a housing project.

Sixth Affirmative Defense

XII

The relief sought by plaintiffs is beyond the jurisdiction of the court in that the Complaint seeks to obtain a court order directing and compelling defendants to exercise their legislative power and discretion in a certain way.

Wherefore, defendants, and each of them, pray for judgment as follows:

1. That plaintiffs take nothing by their Complaint;
2. Costs of suit; and
3. Such other relief as the Court deems proper.

Dated: November 12, 1969.

FERDINAND P. PALLA,

City Attorney,

By RICHARD W. MARSTON,

Deputy City Attorney,

Attorneys for Defendants.

(Proof of Service omitted)

[Title of Court and Cause]

**AFFIDAVIT OF BENJAMIN E. WELLS IN
SUPPORT OF PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT.**

State of California

County of Santa Clara—ss.

Benjamin E. Wells, being first duly sworn, deposes and says: I am head of the Research and Capital Improvements Programming Division of the San Jose City Planning Department. In that capacity, I was given charge of the preparation of the Neighborhood Analyses Element of the San Jose Workable Program for Community Improvement submitted to the Department of Housing and Urban Development in November, 1968.

In making that study, we relied in part on data gathered in 1967 by the Housing Division of the San Jose City Health Department for our information on housing conditions in the City of San Jose. We found from that data that 16 of 46 neighborhoods had three or more blocks with substandard housing rates over 20%. Since this rate was considered a critical level, we selected these 16 neighborhoods for detailed analysis. The analysis included study of the social and economic characteristics of people affected by blight in those neighborhoods. The analysis attempted to point out the causes of blight by correlating the frequency of each of the social and economic characteristics indicating social breakdown with the level of substandard housing. The objective was to determine which characteristics caused blight more than others.

It was statistically shown that low income was most highly correlated with substandard housing. We used multiple regression techniques in making this analysis.

A true and correct copy of the study entitled *Neighborhood Analyses, November, 1968*, is attached to this affidavit.

/s/ Benjamin E. Wells

Subscribed and Sworn To Before Me This 25th Day of November, 1969.

(Seal)

/s/ Alice B. Pedigo,
Notary Public in and for the
County of Santa Clara, Calif.

My commission expires Aug. 7, 1971.

[Title of Court and Cause]

**PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, plaintiffs respectfully move for a summary judgment for the relief demanded in the complaint on the grounds that there is no genuine issue as to any material fact and that plaintiffs are entitled to a judgment as a matter of law.

This motion is based upon the pleadings, the affidavits attached to the complaint, the affidavit of counsel for the plaintiffs pursuant to Local Rule 118 of the United States District Court for the Northern

District of California, the memorandum of points and authorities attached to the complaint and the memorandum of points and authorities annexed to this motion.

Dated: November 22, 1969

/s/ Diane V. Delevett
Attorney for Plaintiffs

[Title of Court and Cause]

STIPULATION OF FACT

It Is Hereby Stipulated by and between the attorneys for the plaintiffs and the municipal defendants herein that the following facts are true and are not controverted herein.

No type of housing is owned or leased by any state public body of the State of California (i.e., by any non-federal public entity in California) for residential purposes other than housing for rental to persons of low income, as such persons are defined by Article 34 of the California Constitution, except the following:

(1) Housing owned or leased by the Regents of the University of California, or by the State Colleges of California, for rental to students, faculty and certain administrative officers. Such housing, although mostly rent subsidized, is not available for occupancy by the public at large, and it is made available without regard to the income or the estate of the prospective occupant;

(2) Housing owned by various, non-federal public entities acquired incidentally by negotiation or eminent domain proceedings for non-housing, public works purposes (such as street widenings, highway construction, parks, school construction, sewer and drain line construction, and other public works projects) which housing is often rented by said entities on a month-to-month, temporary basis either to the former owners, to tenants of the former owners, to local housing agencies for subletting to persons of low income or directly by such entities to persons of low income until such time as the destruction or other removal of such housing is necessary to complete said public works projects; and

(c) Housing for employees of State institutions such as State hospitals and prisons, for employees of State parks or historical monuments, and the Governor's mansion.

Dated: Nov 26 1969

Ferdinand P. Palla, City Attorney
By /s/ Richard W. Marston
Attorneys for municipal defendants
/s/ Diane V. Delevett
Attorney for plaintiffs

(Proof of Service omitted)

Robert F. Peckham
52076

CIVIL DOCKET

United States District Court
3 Judge Court
(Judges Hamlin, Peckham & Levin)

Jury demand date: Nov. 24, 1969

Defendants

Attorneys

For plaintiff:

Don B. Kates, Jr.
Brian Paddock
Diane V. Delevett
Peter D. Coppelman
22 Martin Street
Gilroy, CA

Legal Aid Society of Santa Clara County
1656 East Santa Clara
San Jose, CA

National Housing Law Project
Earl Warren Legal Center
Berkeley, CA

For defendant:

City Atty, 412 City Hall
San Jose, Calif.

Robert S. Sturges, 777 N. 1st St.,
San Jose
U. S. Atty for Fedl. Defts.

Anita Valtierra, et al.,

vs.

Housing Authority City of San Jose, et al.

STATISTICAL RECORD

J.S. 5 mailed 8-27-69

(Date - 8-28-69) (Name or Receipt No. - 69982) (Rec. - 15.00)

(Date - Aug 29 1969) (Name or Receipt No. - C-D1-17)

(Disb. - 15.00)

(Date - 4-10-70) (Name or Receipt No. - 74724 (Appeal)

(Rec. - 5.00)

J.S. 6 mailed

(Date - Apr 14 1970) (Name or Receipt No. E-D1-81)

(Disb. 5.00)

Basis of Action: Declaratory Injunctive Relief,
Article 34, California Constitution (Housing)

1969:

Aug. 27—

1. Filed complaint and issued summons (three judge court requested).

Aug. 29—

Filed to L & M re appli. for a 3 judge court (CSL).

Aug. 27—

2. Filed Order pursuant to Rule 4(c).
3. Filed Order to Show Cause ret. 11/14/69. (Peckham)
4. Filed Memo of Pts. & Auths, in Support of Complaint.
5. Filed App. for Convening of a 3 Judge Dist. Court.
6. Filed Notification & Certificate re Three (3) Judge Action. (Peckham)

Sept. 2—

7. Filed order convening 3 Judge Court, Consisting of Judges, Oliver D. Hamlin, Robert F. Peckham & Gerald S. Levin (Chambers, C.J.)

Sept. 23—

8. Filed defts notice of mo to dismiss & to deny application to convene 3 judge court, 11-14-69, 10AM, Judge Peckham, San Jose.

Oct. 7—

Issued ALIAS SUMMONS. Orig Misplaced.

Oct. 7—

9. Filed affidavit for issuance of alias summons.

Oct. 14—

10. Filed alias summons on ret, exec. 5 Sept. 69.

Oct. 22—

Issued alias summons.

Oct. 22—

11. Filed pltfs notice of mo & mo for enlargement of time to serve OSC, 10-30-69, 9:30AM, San Jose.

Oct. 24—

12. Filed summon on ret, exec. 10-23-69.

Oct. 27—

13. Filed ANS of deflt Housing Authy of City of San Jose.

Oct. 28—

14. Filed pltfs affidavit of sve of summons, complaint, etc.
15. Filed pltfs affidavit of mailing mo. for enlargement of time etc.

16. Filed pltfs affidavit of sve of summons, complaint, etc.

Oct. 29—

17. Filed Fed. defts memo re pltfs mo for enlargement of time.

Oct. 31—

- ORD aft hrg, pltfs mo to enlarge time for sve granted. (Peckham)
18. Filed pltfs request for admissions.
19. Filed ORD for enlargement of time re pltfs time to serve OSC to 10-29-69. (Peckham)

Nov. 3—

20. Filed ret on sve of writ, exec 10-23-69 as to US. Atty.

Nov. 4—

21. Filed Clerks notice of hrg motions contd to 11-20-69, 10AM, San Jose.

Nov. 12—

22. Filed Clerks notice of THREE JUDGE HRG motions contd to 11-20-69, 10 AM, San Jose.
23. Filed defts notice of mo to dismiss, 11-20-69, 10AM, San Jose.

Nov. 17—

- 24-A Deft Suppl Mem. support of mo to Dismiss.
24. Filed defts USA notice of mo & mo, ret to OSC & to dismiss, 11-20-69, 10AM.

Nov. 20—

25. Filed defts Virginia C. Shaffer RESPONSE to request for admissions.

26. Filed defts Ronald James, Norman Y. Mineta, Joseph Colla, Walter V. Hays, David J. Goglio & Kurt Gross to request for admissions.
27. Filed pltfs memo of pts & auths in ans to mo to dismiss etc.
28. Filed pltfs affidavit of Franklin Miles Lockfeld.
29. Filed copy of "Draft" "The Housing Situation: 1969".

Nov. 24—

30. Filed fedl. defts suppl. memo.
31. Filed defts ANS & request for JURY TRIAL.

Nov. 25—

32. Filed pltfs mo for sum, judgmt.

Nov. 20—

Ord. aft. 3 Judge hearing mo. of deft City of San Jose to dismiss, mo. of Deft. San Jose Housing Auth. to dismiss, Fed. defts mo. to dismiss. & pltff's. appl. for perm. injunc. in action 52076 (in action C69-1 hrg was for return on O.S.C. re prelim. injunc.), defts' counsel to file fur. affidavits by Dec. 1, 1969; pltffs' counsel to file counter-affidavits by Dec. 8, 1969; upon receipt of said affidavits the various mos. will be deemed submitted to the 3 judge court. (Hamlin, CJ, Peckham & Levin, DJ's)

Nov. 28—

33. Filed STIP of fact.

Dec. 8—

34. Filed Fed. Defts memo re pltfs mo for sum. judgt.

Dec. 10—

35. Filed pltfs affidavit of mailing pltfs mo for sum, judgt, etc.

1970:

Mar. 23—

36. Filed MEMO OF DECISION & ORD; Ord that federal defts mo for dismissal granted; pltfs mo for sum. judgmt declaring Article XXXIV of the CA State Constitution to be unconstitutional & their application for inj. granted. (Hamlin, Peckham & Levin)

Apr. 1—

37. Filed defts mo to amend decision dtd 3-23-70 & ORD shortening time for hrg on mo to 4-2-70, 2PM. (Peckham)

Apr. 2—

THREE JUDGE COURT HRG, defts mo for stay of inj submitted & denied.

(Hamlin, Levin & Peckham)

38. Filed ORD granting pltfs mo for sum judgmt, declaratory judgmt & Perm. inj.
(Hamlin, Peckham & Levin)

Apr. 10—

39. Filed joint notice of Appeal in Civil 52076 & C-69-1-RFP by Defendants for the Supreme Court of the United States.
40. Filed Designation of Record on Appeal by Defendant's.

41. Filed Defendant's amended designation of contents of record on Appeal.

Apr. 13—

42. Filed Order to expedite appeal to the U.S. Supreme Court it is Ordered that the Clerk of the Court prepare & send the record of these two consolidated cases up to the Supreme Court within five (5) days. (Peckham)

Apr. 20—

Made, Mailed Record on Appeal Supreme Court of the U.S.

43. Filed ORD of DISMISSAL w/prejudice as to Federal debts. (Hamlin, Peckham, Levin) (Cys mailed)

May 6—

44. Filed Stipulation of Counsels that the Xerox copies certified by the Clerk of the District Court for the Northern District of California as the Record on Appeal are true copies of the originals.

May 7—

Re Made, Mailed Record on Appeal Supreme Court of the U.S.

June 1—

45. Filed certificate of clerk to record on appeal.

Original Filed Oct 1 1969,
Clerk, U. S. Dist. Court
San Francisco

United States District Court
for the Northern District of California

Civil Action No. C-69-1

Gussie Hayes, Diane Hayes, Carolyn Hayes, Cathy Hayes, Tommy Hayes, Barbara Hayes, Danny Hayes (by their general guardian, Gussie Hayes), Iota Weatherwax, Carroll Peil, Lawrence Peil, Mary Peil, Donna Peil, Robert Weatherwax (by their general guardian, Iota Weatherwax), Jo-Ann Brown, Karen Jackson, Kevin Jackson, Kenneth Jackson (by their general guardian, Jo-Ann Brown), Shirley Mae Luke, Sylvester Jones (by his general guardian, Shirley Mae Luke), on their own behalf and on behalf of all persons similarly situated,

Plaintiffs,

vs.

The Housing Authority of San Mateo County, a public entity; William G. Weman, individually and as Executive Director of the Housing Authority of San Mateo County; Benjamin Ichinose; Ben Albrecht; Perry A. Bygdnes; Raymond Rucker; and James A. Tassos, individually and as Commissioners of the Housing Authority of San Mateo County,

Defendants.

COMPLAINT FOR DECLARATORY AND IN-
JUNCTIVE RELIEF; THREE JUDGE COURT
REQUESTED

I. *Jurisdiction*

1. This action is brought to vindicate the plaintiffs' rights to safe, sanitary and decent housing under

the Housing Act of 1937 (42 U.S.C. §§ 1401, *et seq.*), and to be free of discrimination on account of race and poverty in securing housing opportunities under that Act. The action is authorized by the Act and by 42 U.S.C. § 1983, inasmuch as it seeks to redress the deprivation, under color of Article XXXIV of the Constitution of the State of California, of rights, privileges and immunities secured by the Constitution and laws of the United States, specifically: the Equal Protection and Privileges and Immunities Clauses of the Fourteenth Amendment, the Supremacy Clause (U.S. Const., Art. VI, cl. 2), the Housing Act of 1937, 42 U.S.C. § 1981, and 42 U.S.C. § 1982. Jurisdiction is conferred on this Court by 28 U.S.C. § 1343(3), (4); and also by 28 U.S.C. § 1331. The matter in controversy exceeds the value of \$10,000, because each plaintiff herein sues to remedy the denial of his or her right to safe, sanitary and decent housing which, in the case of each, has a value of more than that amount.

2. A declaratory judgment is sought pursuant to 28 U.S.C. §§ 2201-2202 that Article XXXIV of the *California Constitution is unconstitutional on its face and as applied*. Injunctive relief restraining the defendants from enforcing Article XXXIV upon that ground is also requested. Accordingly, a three-judge court is required by 28 U.S.C. §§ 2281, 2284.

II. Parties

3. Plaintiff Gussie Hayes is a black citizen of the United States and resides in San Mateo County. She

lives with five of her six minor children in a three-bedroom house that is infested by rodents and insects. She is forced to allow one of her children to live with her sister because of the crowded and unsanitary conditions in the house. The bathroom is not usable because of backup of sewage in the toilet and the bathtub. Her children go to her sister's house to use the bathroom. The whole house smells of sewage. The City of Menlo Park has ordered that the landlord correct numerous housing code violations, but the unhealthy and unsafe conditions still exist. The City's letter of July 8, 1969, and Notice of Abatement of Public Nuisance Requiring Repair, Rehabilitation and Maintenance of Property, marked Exhibit A and B, respectively, and attached hereto, are incorporated by reference into this Complaint.

4. Gussie Hayes and her children have been determined to be eligible for public housing, and have been placed on the waiting list. They have now been on the waiting list for public housing for about eight months. By reason of the operation of Article XXXIV of the California Constitution, no public housing is available for them or for anyone else on the list. Mrs. Hayes has been unable to find a sanitary and safe house at a price she can afford. She pays \$140.00 a month rent for the house described above. She would only pay about 75.00 a month for a clean and safe house if placed in public housing. Her family has suffered from unhealthy and dangerous conditions in the home, and from lack of funds for necessities because of the high rent. Gussie Hayes has suffered particularly from having to break up

her family. Plaintiff Hayes' Affidavit, marked Exhibit C and attached hereto, is incorporated by reference into this Complaint.

5. Plaintiffs Diane Hayes, Carolyn Hayes, Cathy Hayes, Tommy Hayes, Barbara Hayes, and Danny Hayes, are the minor children of Gussie Hayes. They sue herein by their general guardian Gussie Hayes.

6. Plaintiff Iota Weatherwax is a citizen of the United States, and resides in San Mateo County. She lives with her five minor children in the home of her daughter and son-in-law, who have four minor children. The three-bedroom house is oppressively overcrowded. Mrs. Weatherwax receives \$263.00 a month from the Welfare Department. She is supposed to receive support money as well, but has not received support money for about three months. On her income she cannot find a home for herself and her five minor children. Decent housing for a family of six would require a three-bedroom house at the least. Mrs. Weatherwax has searched exhaustively, but has found no house she can afford. Even the most run-down three-bedroom house that is available is too expensive for her.

7. Mrs. Weatherwax is afraid of breaking up her daughter's marriage if she remains with her. Her daughter and son-in-law have no privacy at all and there is a good deal of tension owing to the overcrowding. She is faced with the alternatives of breaking up her own family or staying in her daughter's house and possibly breaking up that marriage. Mrs. Weatherwax called defendant Housing Authority

seeking public housing in March of 1969. She was told that she could not be interviewed until June 5. On that day, she was interviewed, determined to be eligible, and placed on the waiting list. In August 1969, she was placed on the emergency waiting list. By reason of the operation of Article XXXIV of the California Constitution, no public housing is available for her or for anyone else on the list. If placed in public housing, Mrs. Weatherwax could obtain decent, safe and sanitary housing for about \$75.00 a month, five dollars less per month than she now pays her daughter as her share of a three-bedroom dwelling that houses twelve inhabitants. Plaintiff Iota Weatherwax's Affidavit, marked Exhibit D and attached hereto, is incorporated by reference into this Complaint.

8. Plaintiffs Carroll Peil, Lawrence Peil, Mary Peil, Donna Peil, and Robert Weatherwax are the minor children of Iota Weatherwax. They sue herein by their general guardian, Iota Weatherwax.

9. Plaintiff Jo-Ann Brown is a black citizen of the United States, and a resident of San Mateo County. She lives in a one-bedroom apartment with her three minor children. The house was infested with roaches, is overcrowded, run-down, and in need of painting. There are no garbage cans provided. She and the other seven tenants of the building have to put their garbage in paper bags outside. The face bowl in her bathroom broke away from the wall and her apartment was flooded. Despite numerous requests, the landlord has not made necessary repairs.

10. Mrs. Brown had been receiving welfare, was employed for a short time, and has now applied for welfare again. At the present time she does not have any income. She has been determined to be eligible for public housing and has been on the waiting list since 1968. By reason of the operation of Article XXXIV of the California Constitution, no public housing is available for her or for anyone else on the list. Plaintiff Brown's Affidavit, marked Exhibit E and attached hereto, is incorporated by reference in this Complaint.

11. Plaintiffs Karen Jackson, Kevin Jackson, and Kenneth Jackson are the minor children of Jo-Ann Brown. They sue herein by their general guardian, Jo-Ann Brown.

12. Plaintiff Shirley Mae Luke is a black citizen of the United States and resides in San Mateo County. She lives in a one-bedroom house with her son who is $2\frac{1}{2}$ years old. The house is infested with roaches and run-down. She receives \$148.00 a month from welfare, \$90.00 of which goes for rent.

13. In July 1969, Mrs. Luke called for an appointment with defendant Housing Authority to apply for public housing and was told that she could not have an appointment to determine eligibility until December 18, 1969. She was given an appointment for that date. She is eligible for public housing. If she were placed in public housing, she would pay only one-half of the gross value of rent a month for a two-bedroom apartment. By reason of the operation of Article XXXIV of the California Constitution, no public

housing is available for her or for any person similarly situated. Plaintiff Luke's Affidavit, marked Exhibit F and attached hereto, is incorporated by reference into this Complaint.

14. Plaintiff Sylvester Jones is the minor child of Shirley Mae Luke. He sues herein by his general guardian, Shirley Mae Luke.

15. Plaintiffs sue on their own behalf and on behalf of all persons similarly situated. The class is so numerous that joinder of all members is impracticable. There are questions of law and questions of fact common to the class; the claims of the named plaintiffs are typical of the claims of the class; and the named plaintiffs will fairly and adequately protect the interests of the class. The defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief and declaratory relief with respect to the class as a whole. Questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

16. Defendant Housing Authority of the County of San Mateo is a public entity established pursuant to California Health and Safety Code §§ 34200 *et seq.* In March of 1941, the Board of Supervisors of San Mateo County, acting pursuant to law, passed a resolution declaring the need for a Housing Authority so that public housing projects would be undertaken in the County to provide safe and sanitary dwelling ac-

commodations, which would be available to persons of low income at rentals they could afford. The Resolution, marked Exhibit G and attached hereto, is incorporated by reference into this Complaint.

17. Defendant Weman is the Executive Director of the Housing Authority. Defendants Ichinose, Albrecht, Bygdnes, Rucker, and Tassos, are duly appointed Commissioners of the Housing Authority. Each defendant is sued individually and in his official capacity.

18. Defendants are authorized and responsible by law to administer and implement in San Mateo County any and all public housing programs under the Housing Act of 1937.

III. *Facts*

19. In 1937, Congress passed the United States Housing Act of 1937, 42 U.S.C. §§ 1401 *et seq.* The Act expressly states it to be the Nation's policy to employ the Nation's funds to assist the States to remedy unsafe and unsanitary housing conditions and an acute shortage of decent, safe and sanitary dwellings for families of low income—evils which were found to be injurious to the health, safety, and morals of the citizens of the Nation. The purpose of the Act was to enable the provision of an adequate supply of low-rent housing, defined as decent, safe and sanitary dwellings within the financial reach of families of low income. Families of low income were defined as the lowest income group, who cannot afford to pay enough to cause private enterprise in their locality

or metropolitan area to build an adequate supply of decent, safe, and sanitary dwellings for their use.

20. The Act created the United States Housing Authority (the name has since been changed to the Public Housing Administration) in the Department of Housing and Urban Development. The Authority was empowered to make preliminary loans to public housing agencies to assist the planning of low-rent housing projects; loans, to assist the development, acquisition, and administration of low-rent housing projects; annual contributions, to assist in achieving and maintaining the low-rent character of the housing projects; and capital grants, in special circumstances. Under the Act, the Authority may only make a preliminary loan when the governing body of a locality has by resolution approved the application of a local public housing agency for such a loan, and the public housing agency has demonstrated to the Authority the need for low-rent housing which is not being met by private enterprise. The Authority may then make contracts for loans or annual contributions only if the governing body of the locality has entered into an agreement with the local public housing agency providing for the local cooperation required by the Authority, and the Authority is satisfied with the project plans.

21. In order to implement the Housing Act of 1937, California enacted the Housing Authorities Law (Health and Safety Code §§ 34200 *et seq.*) That law included specific legislative findings that insanitary and unsafe dwelling accommodations exist in the

State where persons of low income are forced to reside; that there is a shortage of safe and sanitary dwelling accommodations available at rents which low-income people can afford; that such persons must live in overcrowded and congested dwelling accommodations; and that such conditions constitute a menace to the health, safety, morals, and welfare of the residents of the State.

22. The Housing Authorities Law provides for a public corporate body to be formed in each county and city known as the Housing Authority. That Authority cannot transact business or exercise powers unless by resolution the governing body of the county or city declares that there is a need for an Authority. The Authority may borrow money or accept grants from the Federal Government and do any and all things necessary to secure the financial aid of the Federal Government. It may issue bonds for any of its corporate purposes. In accordance with the requirements of the Housing Act of 1937, any low-rent housing project proposal must be approved by the governing body of the county or city where it will be developed.

23. On March 18, 1941, by Resolution No. 468, the Board of Supervisors of San Mateo County declared the need for a Housing Authority pursuant to the Housing Authorities Law. The Resolution is attached hereto, marked Exhibit G.

24. By initiative Constitutional Amendment, Article XXXIV was added to the California State Con-

stitution in 1950. That Article provides in relevant part:

Section 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

For the purposes of this article the term "low rent housing project" shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. . . .

For the purposes of this article only "persons of low income" shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

25. In accordance with Article XXXIV, defendant Housing Authority of San Mateo County caused two referenda to be held on low income projects for

the elderly in Pacifica in 1966. Both failed. Certified copies of the election results, marked Exhibit H and I, respectively, and attached hereto, are incorporated by reference into this Complaint.

26. By reason of the failure of these referenda and by reason of the belief that any proposal for public housing in San Mateo County would be overwhelmingly defeated in the referendum required by Article XXXIV, defendants have caused no referenda to be held in the County since 1966. For the same reasons, they do not now plan to propose any low-income public housing projects for approval by referendum. It is the belief of defendant Executive Director Weman that fear of property devaluation on the part of middle-and-above-income residents, coupled with their fear of an influx of low-income and minority-group families, preempts the possibility of a successful referendum. Mr. Weman's Affidavit, marked Exhibit J and attached hereto, is incorporated by reference into this Complaint.

27. Defendants believe themselves bound by the requirements of Article XXXIV of the California Constitution to secure approval by referendum for any low-income housing development. In the enforcement of Article XXXIV, they will not proceed to make application for federal funds or to take any other step directed toward the development of low-income public housing under the Housing Act of 1937 unless and until authorized by a referendum. And they will not cause any referendum on low-income public housing to be held, because they are convinced

that it would fail. Plaintiffs have no means to require defendants to hold a referendum.

28. San Mateo County now has a drastic need for low-income housing that is not being met, and cannot be met, by private enterprise. Plaintiffs and their class comprise thousands of persons who do not have, and cannot afford, safe, sanitary and decent housing. Defendant Housing Authority now has a waiting list of 2,000 families who have been determined to be eligible for low-income public housing. Other families have applied for such public housing but have not yet been determined to be eligible; they are calendared for interviews to determine eligibility. The interview calendar is so crowded that persons phoning the Authority in the month of September 1969 are being scheduled for interviews in December 1969.

29. There is now no low-income public housing available in San Mateo County.

30. No low-income public housing can or will be developed in San Mateo County so long as the defendants continue to enforce Article XXXIV of the California Constitution.

31. But for the operation of Article XXXIV, the defendants would be authorized and able to cause the development of low-income public housing in San Mateo County, with the assistance of federal funds available under the Housing Act of 1937. Such housing would be available to plaintiffs and persons similarly situated.

IV. *First Claim*

32. Article XXXIV of the California Constitution violates the rights of the plaintiffs under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, in that:

A) On its face and as applied, it creates, encourages and requires invidious discrimination against the plaintiffs as poor persons, because of their poverty, in regard to access to safe, sanitary and decent housing; and

B) In its design and necessary effect, and in its actual operation, it creates, encourages and requires invidious discrimination against the plaintiffs as black persons, because of their race, in the same regard.

33. For the reason stated in paragraph 32(B) above, Article XXXIV also violates the rights of the plaintiffs, as black persons, under 42 U.S.C. §§ 1981 and 1982, to acquire interests in real property, and to have the protection of law for those property interests, on an equal footing with white persons, without discrimination based on race.

34. Article XXXIV thereby discriminatorily denies the plaintiffs access to safe, sanitary and decent housing. By reason of the operation of Article XXXIV, no public housing is available, or can be made available, for the plaintiffs and persons similarly situated, in San Mateo County. By compulsion of Article XXXIV, the defendants have failed, are failing, and will fail to provide for the plaintiffs safe, sanitary and decent housing which the defendants are otherwise authorized and able to provide with the

assistance of federal funds available under the Housing Act of 1937.

35. Therefore there exists between the plaintiffs and the defendants an actual controversy regarding the constitutional validity of Article XXXIV under the Equal Protection Clause, the Supremacy Clause, and 42 U.S.C. §§ 1981 and 1982. That controversy requires that this Court declare Article XXXIV unconstitutional and enjoin its enforcement by the defendants.

V. *Second Claim*

36. Article XXXIV of the California Constitution violates the rights of the plaintiffs under the Housing Act of 1937, and thereby under the Supremacy Clause and the Privileges and Immunities Clause of the Fourteenth Amendment, in that:

A) On its face and as applied, it burdens and frustrates the operation of the Housing Act, and deprives the plaintiffs of benefits which the Housing Act seeks to confer upon them; and

B) On its face and as applied, it is inconsistent with the provisions of the Housing Act because it:

1) Subjects the benefits sought to be conferred upon the plaintiffs by the Housing Act to licensure by local referendum, which is incompatible with the provisions of the Act and defeats its purposes;

2) Authorizes and encourages discrimination against the plaintiffs on the grounds of race and poverty in the administration of the Act, incompatibly with the purposes of the Act; and

3) Subjects the benefits sought to be conferred upon the plaintiffs by the Housing Act to an unconstitutional condition, as described more fully in the **FIRST CLAIM**, above.

37. Article XXXIV thereby denies the plaintiffs access to safe, sanitary and decent housing which is their right under the Housing Act and the Supremacy Clause, and a privilege of citizenship conferred by national legislation. By reason of the operation of Article XXXIV, no public housing is available, or can be made available, for the plaintiffs and persons similarly situated, in San Mateo County. By compulsion of Article XXXIV, the defendants have failed, are failing, and will fail to provide for the plaintiffs safe, sanitary and decent housing which the defendants are otherwise authorized and able to provide with the assistance of federal funds available under the Housing Act.

38. Therefore there exists between the plaintiffs and the defendants an actual controversy regarding the validity of Article XXXIV under the Housing Act, the Supremacy Clause, and the Privileges and Immunities Clause of the Fourteenth Amendment. That controversy requires that this Court declare Article XXXIV invalid and enjoin its enforcement by the defendants.

VI. *Injury to Plaintiffs; Equity*

39. By the operation of Article XXXIV, plaintiffs have been, are being, and will be deprived of their federal rights to safe, sanitary and decent hous-

ing. They will daily be forced to live, as they have been living, in overcrowded, unsanitary and demeaning conditions; and they will daily be required to expend for housing monies that they cannot afford and that they need for food, clothing and other necessities. The rights of which they are thus deprived are of a value, to each of them, in excess of \$10,000. Those rights are irreparably damaged by the conduct of the defendants under Article XXXIV, which conduct daily denies the plaintiffs the safe, sanitary and decent housing to which they are entitled by federal law.

40. Unless this Court declares Article XXXIV invalid and enjoins its enforcement, plaintiffs will continue to be deprived, as they have heretofore been deprived, of their federal rights to safe, sanitary and decent housing, and their rights against discrimination on account of race and poverty in access to housing. Plaintiffs have no adequate remedy at law for the redress of this deprivation, nor any other remedy than the declaratory and injunctive process of this Court. A declaration that Article XXXIV is invalid and an injunction of its enforcement by the Court is necessary to protect the plaintiffs against irreparable injury. Such a declaration and injunction will do no harm to the valid and legitimate interests of the defendants or the State of California.

VII. *Prayer for Relief*


41. Accordingly, plaintiffs request that:

A) A statutory three-judge court be convened to hear this matter, as required by 28 U.S.C. §§ 2281, 2284;

B) After plenary hearing of the facts and the law, the Court declare Article XXXIV of the Constitution of the State of California invalid;

C) The Court issue its injunction restraining the enforcement of Article XXXIV by the defendants; and

D) The Court decree such other and further relief to the plaintiffs as may appear lawful, just and equitable.

Dated: September 29, 1969. 

/s/ Lois P. Sheinfeld

Attorney for Plaintiffs

2221 Broadway

Redwood City, California 94063

(Notary affidavit omitted)

Exhibit A

(Letterhead of City of Menlo Park)
Office of George A. Asborno
Building Official

July 8, 1969

Re: 220 Hamilton Avenue

Myrtle Lugent
2359 Palo Verde
Palo Alto, Calif.
Dear Mrs. Lugent:

In the recent inspection of your property by the Menlo Park Housing Inspection Team the following Housing Code violations were found:

- (1) Uniform Housing Code, Section H1001(b)12.
Inadequate Sanitation.

"Infestation of insects, vermin or rodents as determined by the health officer, Mr. Brian Brumm, of the San Mateo County Department of Public Health."

The roaches and mice must be eliminated by a State Licensed Exterminator. The exterminator must furnish a written notice to the Building Department that the infestation has been eliminated from the premises.

- (2) Uniform Housing Code, Section H1001(k).
Hazardous or Unsanitary Premises.

"Those premises on which an accumulation of weeds, vegetation, junk, dead organic matter, debris, garbage, offal, rat harborages, stagnant

water, combustible materials, and similar materials or conditions constitute fire, health, or safety hazards."

There must be a general clean-up of the yard. All weeds, high grass and overgrown trees and shrubs must be cut and removed from the property to alleviate the danger of fire and rodent or insect infestation.

The fence is in disrepair and must be repaired, replaced, or removed.

(3) Uniform Building Code, Table 5B.

- a. The one hour fire wall between the garage and house is broken through and must be repaired.
- b. There must be a fire door between the kitchen and garage. This must be 1 3/8" solid core, self closing, and tight fitting.

The present door could be made to conform by placing 1/2" sheet rock on the garage side in the indentation, and covering the door with 20 gauge galvanized sheet metal or 1/4" asbestos board, properly attached with screws.

(4) Uniform Housing Code, Section H1001(c)4.
Structural Damage.

There is structural damage to the garage wall. This damage must be repaired.

(5) Uniform Housing Code, Section H1001(f).

Hazardous Plumbing.

- a. The cement wash tray is illegal. (U.P.C., Sec. 905(b)). The wash tray must be removed and replaced with a trapped sanitary sewer connection with 18" to 30" stand pipe. (U. P.C., Sec. 604).
- b. The copper gas line is illegal (U.P.C., Section 1212). The gas line must be replaced.

(6) Uniform Housing Code, Section H1001(b)13.

Inadequate Sanitation.

- a. The foundation vent screens are broken and must be repaired.
- b. The walls and ceiling in the kitchen and bathroom must be painted with an approved non-absorbent paint (enamel). All holes and defects must be patched.
- c. The kitchen drainboard is defective and we recommend that it be regROUTED and sealed.

(7) Uniform Housing Code, Section H505(e).

Water Closet Compartments.

The bathroom floor must be repaired or replaced with a proper non-absorbent floor tile.

(8) Uniform Housing Code, Section 41001(h).

Faulty Weather Protection.

- a. There are broken windows which must be replaced.
- b. The City of Menlo Park recommends that the exterior woodwork be painted.

(9) Menlo Park Ordinance #441.

"Grading shall be performed around every building so as to provide a slope away from the building with a minimum grade of one-half inch per foot ($\frac{1}{2}$ " per 1') for a distance of at least thirty inches (30") from the building. If in the Building Official's opinion, water will collect and remain in the sub area, some means of removing the water shall be provided to the satisfaction of the Building Official."

Due to improper grading, the building site is ponding water next to the building. The water must be eliminated.

(10) Uniform Housing Code, Section H1001(g).

Hazardous Mechanical Equipment.

- a. The wall space heater is defective and must be repaired or replaced.
- b. The wall over the heater is defective. This wall must be replaced.

(11) Uniform Housing Code, Section H1101(e).

Hazardous wiring.

There is illegal electric wiring on the premises. This wiring must be made to conform to electrical codes or removed. An electrical inspection by the Menlo Park Building Inspector will be required.

(12) Uniform Building Code, Section 3305(c).
Rise and Run.

"The rise of every step in a stairway shall not exceed seven and one-half inches ($7\frac{1}{2}$ "") and the run shall be not less than ten inches (10"). Except as provided under Subsection (d) the maximum variations in the height of risers and the width of treads in any one flight shall be three sixteenths inch ($3/16$ "").

EXCEPTION: In private stairways serving an occupant load of less than 10 the rise may be eight inches (8") and the run may be nine inches (9").

The stair leading from the house to the garage is defective and must be replaced.

The roaches and mice must be eliminated by July 17, 1969 and the remainder of the violations must be corrected by July 28, 1969.

If you have any questions please contact the Building Department, 325-3211.

Very truly yours,
/c/ Gene C. Krummel
Housing Inspector

GCK:cp

cc: Health Department
Gussie Hayes, Tenant

Exhibit B

NOTICE

Abatement of Public Nuisance
Requiring Repair, Rehabilitation and
Maintenance of Property

City of Menlo Park, California

Subject Property: 220 Hamilton Ave.
Assessor's Parcel No. 055-352-020

Pursuant to Chapter 17, Menlo Park City Code, NOTICE is hereby given to the owner, occupant, or other person in control of subject property, that the City Code violations described on the attached "list of violations" are required to be corrected within 4 days from the date of this notice.

If these violations are not corrected by said time, the City will have the violations corrected. The cost of such work and any and all sums expended by the City shall become a lien on the subject property and a personal charge against the owner of the property and the person creating the condition constituting the violations.

Date of Notice: September 11, 1969

For the City Manager
By /s/ George A. Asborn
Building Official

Violations

- (1) Uniform Housing Code, Section H1001(b)12.

Inadequate Sanitation.

"Infestation of insects, vermin or rodents as determined by the health officer, Mr. Brian Brumm, of the San Mateo County Department of Public Health".

The mice must be eliminated by a State Licensed Exterminator. The exterminator must furnish a written notice to the Building Department that the infestation has been eliminated from the premises.

- (2) Uniform Housing Code, Section H1001(b)1.

Inadequate Sanitation.

The bathtub sanitary sewer drain is plugged-up.

The bathtub sanitary sewer line must be opened.

- (3) Uniform Housing Code, H1001(d). Nuisance.

The main sewer lateral has a partial stoppage and is open in the back yard in at least one place. The sewer lateral must be repaired and un-stopped. There must be an inspection by the Building Department before the sewer lateral is back-filled.

Exhibit C

AFFIDAVIT

State of California
County of San Mateo—ss.

Gussie Hayes, being sworn, says:

I am a citizen of the United States, and reside in Menlo Park, San Mateo County. I am the mother of six minor children: Diane Hayes, age 12; Carolyn Hayes, age 11; Cathy Hayes, age 10; Tommy Hayes, age 7; Barbara Hayes, age 6; and Danny Hayes, age 5. All of my children live with me except Barbara, who is now staying with my sister.

I reside with my family in a three bedroom house which is infested with mice and roaches. For some time the sewer line in the backyard was broken, and it was flushing into the yard and smelling very badly. I contacted Legal Aid about the terrible conditions in my house, and they had the City of Menlo Park come out to look at it. The City told the landlord that if he did not correct violations, they would, and place a lien on the property. The landlord did put some cement over the hole, but now there is a backup of sewage in the toilet and bathtub. My children cannot take baths at home or use the toilet, and they have to go to my sister's house to use the bathroom. The landlord also sprayed the roaches, but there are still roaches and mice in the house. The children are afraid of the mice and hate to stay in the house. The whole house now smells of sewage.

For this house I pay \$140.00 a month rent. I cannot find a decent, sanitary house for that money. I have looked very hard.

I have been on the waiting list for public housing for about eight months. The Housing Authority told me that if I were placed with them, I would pay \$75.00 a month for a three bedroom house or apartment, and it would be clean and sanitary.

My income each month is about \$418.00, \$110.00 from my husband, and \$308.00 from the Welfare Department. With the lower rent, I could afford many necessary things for my children which I cannot give them now. My daughter, Barbara, is living with my sister, who took her in order to get at least one of the children out of the house. If I had public housing, I would be able to have my daughter back and be able to live with my family in a clean and safe house. The Housing Authority is unable to tell me when I will be placed.

/s/ Gussie M. Hayes

Subscribed and sworn to before me this 24th day of September, 1969.

(Seal)

/s/ Betty W. Carroll

Notary Public in and for the
County of San Mateo, Calif.

My commission expires May 13, 1973.

Exhibit D

AFFIDAVIT

State of California
County of San Mateo—ss.

Iota Weatherwax, being sworn, says:

I am a citizen of the United States and reside in Pacifica, San Mateo County. I am the mother of six children: Karen Briemle, age 23; Carroll Peil, age 20; Lawrence Peil, age 12; Mary Peil, age 10; Donna Peil, age 6; and Robert Weatherwax, age 4. I live with all of my children in the home of my married daughter, Karen. Karen and her husband have four minor children of their own who also reside in the house. There are twelve people living in the house, which only has three bedrooms.

The house is terribly overcrowded, and my daughter and her husband have no privacy. I am so grateful to her for taking me and my children in, but I fear for her marriage. I really don't know what to do.

My Social Worker called the Housing Authority in February or March of 1969, but she could not get me an appointment until June 5th. On that day I did have an appointment and was placed on the waiting list for public housing. In August I was placed on the emergency waiting list, but I have heard nothing. When I do call the Housing Authority I am told that nothing is available and to look on my own.

I have tried very hard to find a place on my own, but it is very difficult for me because I have trouble

with my leg, and I do not have a car. I did place my name on real estate lists, and I have looked for a house, but I cannot find one I can afford. The cheapest house I could find was \$185.00 a month, and very run-down and unsanitary. The Housing Authority has a maximum limit of \$155.00 on leased homes, so they would not even look at it. They also said that I would have to have three bedrooms because of the number of children. Three bedroom houses are very expensive, and I cannot afford them.

My income amounts to \$263.00 a month, which I receive from the Welfare Department. I am suppose to receive \$75.00 a month from Mr. Peil, but he hasn't paid it in three months. I pay my daughter \$80.00 a month for rent, and I can barely afford that. If I was placed with the Housing Authority, I could get a three bedroom house or apartment for about \$75.00 a month.

I want to keep my family together, but I am afraid of breaking up my daughter's marriage if I remain with her. I am desperate.

/s/ Iota Weatherwax

Subscribed and sworn to before me this 24th day of September, 1969.

(Seal)

/s/ Michael F. Silberstein,
Notary Public in and for the
County of San Mateo, Calif.

My commission expires October 10, 1972.

Exhibit E

AFFIDAVIT

State of California
County of San Mateo—ss.

Jo Ann Brown, being duly sworn, says:

I am a citizen of the United States and a resident of the City of Menlo Park, State of California. I live with my three children, Karen, Kevin, and Kenneth Jackson, ages six (6), five (5), and three (3), respectively, in a one bedroom apartment for which I pay Seventy-Five Dollars (\$75.00) per month rent.

This apartment, in addition to being too small for my family, is quite run down. The wash basin in the bath room has fallen off of its base, and in spite of my many requests to the landlord to repair it, it still has not been corrected. At the time the wash basin fell, my apartment was flooded, causing great damage to the floor coverings. The landlord has failed to provide containers for garbage disposal, and all of the tenants simply store their garbage in paper bags until it is collected by the scavenger.

I applied for housing through the San Mateo County Housing Authority in 1968, but to date I have not been placed.

I have an application pending with the County Welfare Department, but at the present time I do not have any steady income.

/s/ Jo Ann Brown

Subscribed and sworn to before me this 30th day of September, 1969.

(Seal)

/s/ Esther M. Larsen,

Notary Public in and for the

County of San Mateo, Calif.

My commission expires November 23, 1970.

Exhibit F**AFFIDAVIT**

State of California

County of San Mateo—ss.

Shirley Mae Luke, being first duly sworn says:

I am a single woman and a citizen of the United States residing in Menlo Park, California. The apartment in which I live with my son Sylvester Luke, Two and one-half (2-1/2) years old, is a one bedroom unit which is in very poor condition and infested with roaches; and the rent is Ninety Dollars (\$90.00) per month.

In or about July of 1969, I contacted the San Mateo Housing Authority for placement as a tenant in the Leased Housing Program, but I was informed that I can not be interviewed to determine whether I am eligible for the Leased Housing Program until December 18, 1969.

/s/ Shirley May Luke

Subscribed and sworn to before me this 30th day of September, 1969.

(Seal)

/s/ Esther M. Larsen,
Notary Public in and for the
County of San Mateo, Calif.

My commission expires November 28, 1970.

Exhibit G

Board of Supervisors

Filed Mar 18 1941

W. H. Augustus, Clerk

Bk. 37 Page 288

RESOLUTION No. 468

Board of Supervisors, County of San Mateo, State of California.

Resolution Declaring the Need for a Housing Authority in the County of San Mateo

Be It Resolved by the Board of Supervisors of the County of San Mateo:

That the Board of Supervisors of the County of San Mateo, California, hereby determines, finds and declares, in pursuance of the "Housing Authorities Law" of the State of California, that:

- (1) Insanitary and unsafe inhabited dwelling accommodations exist in the County of San Mateo, California;
- (2) There is a shortage of safe and sanitary dwelling accommodations in the County of San Mateo, California, available to persons of low income at rentals they can afford;
- (3) There is need for a Housing Authority in the County of San Mateo, California; and
- (4) This resolution is hereby declared to be an urgency measure necessary for the immediate preservation of the public peace, health and

safety and shall therefore go into immediate effect. A statement of the facts constituting such necessity is as follows:

Unemployment and the existence of unsafe, insanitary and congested dwelling accommodations in the County of San Mateo, California, have produced an alarming economic and social condition therein. The immediate adoption of this resolution will enable housing projects to be undertaken in this County and furnish employment to many persons now idle, and enable them to become self-supporting, and will alleviate the aforesaid housing conditions.

Regularly passed and adopted this 18th day of March, 1941.

Ayes and in favor of said resolution:

Supervisors: T. L. Hickey
Fred E. Beer
J. W. Poole
Alvin S. Hatch
J. W. Lynch

Noes and against said resolution:

Supervisors: None.

Absent Supervisors: None.

/s/ Fred E. Beer, Chairman,
Board of Supervisors, County of
San Mateo County, California.

Attest:

W. H. Augustus,
Clerk of said Board.

Supervisor Lynch introduced Resolution No. 468 and moved its adoption.

The motion to adopt said resolution was seconded by Mr. Hatch, and upon roll call the following voted Yea: Messrs. Hickey, Poole, Hatch, Lynch, Beer. Nay: Messrs. None.

Thereupon the Chairman declared said resolution duly adopted and passed.

Mr. Lynch then moved that said Resolution No. 468 go into effect immediately, as provided in Section 4 thereof, which Section was then read in full. The motion was seconded by Mr. Hatch and thereupon the Chairman put the question on the adoption of said motion, and upon roll call the following voted Yea: Messrs. Hickey, Poole, Hatch, Lynch, Beer. Nay: Messrs.

Whereupon the Chairman stated that said motion had received the affirmative vote of more than a majority of the Board of Supervisors and declared the same duly adopted.

Exhibit H

**Certificate of County Clerk of Record of
Votes Cast For and Against the Proposition
Submitted to the Voters at the Polling Places
Within the City of Pacifica at the General
Election Held on November 8, 1966.**

In accordance with Resolution No. 899 of the City Council of the City of Pacifica, adopted August 24, 1966, wherein authorization was given to the Board of Supervisors of the County of San Mateo to conduct the canvass of the returns of the special municipal election, which was consolidated with the statewide election held on Tuesday, 8th Day of November, 1966, by order of the Board of Supervisors of the County of San Mateo, expressed in its Resolution No. 23059, for the purpose of submitting to the voters of the City of Pacifica, pursuant to said Resolution No. 899, a proposition identified as "Senior Citizens Housing" on the consolidated ballot, I hereby certify that I caused to be removed and recorded from the voting machines used at said election the record of votes cast at said polling places within said city for and against the proposition voted upon, and I caused to be canvassed the absentee ballots cast at said election for and against the proposition voted upon and that I caused to be filed with the Board of Supervisors of the County of San Mateo on November 22, 1966, a certificate which included the result of the canvass of all of the votes cast at said special municipal election together with the result of votes cast at the said statewide election.

On motion of Supervisor Fitzgerald seconded by Supervisor Werder the Board of Supervisors of the County of San Mateo approved said certificate of the votes cast at said statewide election and said special municipal election.

And I further hereby certify that Exhibit "A" hereto attached and by reference incorporated herein, is a full, true and correct tabulation which states forth the results of the votes cast at the polling places for and against the proposition voted upon within said city and the result of the canvass of the absentee ballots cast and voted for and against said proposition at said special municipal election, and that the figures in said tabulation indicating the results of votes cast at said special municipal election are identical to the figures contained in the certificate approved by the Board of Supervisors of San Mateo County.

Dated this 22nd day of November, 1966.

(Seal)

John A. Bruning,
County Clerk of the County
of San Mateo

Exhibit "A"

Statement of Result of Votes Cast on municipal measure submitted to the voters of the City of Pacifica at a special municipal election consolidated with the statewide election held on Tuesday, November 8, 1966, which measure was identified as "SENIOR CITIZENS HOUSING" on the consolidated ballot.

CITY MEASURE

<u>Precinct</u>	<u>Yes Votes</u>	<u>No Votes</u>	<u>Total Votes</u>
1	80	86	166
2	116	57	173
3	106	120	226
4	84	82	166
5	92	50	142
6	145	121	266
7	117	85	202
8	113	96	209
9	132	110	242
10	114	160	274
11	121	121	242
12	107	147	254
13	47	43	90
14	108	150	258
15	120	122	242
16	116	147	263
17C	131	157	288
18	127	145	282
19	98	135	233

CITY MEASURE

<u>Precinct</u>	<u>Yes Votes</u>	<u>No Votes</u>	<u>Total Votes</u>
20	121	150	271
21	112	131	243
22	120	166	286
23	111	107	218
24	112	151	263
25	122	155	277
26	109	160	269
27	64	73	137
28	108	77	185
29	118	128	246
30	41	59	100
31	61	128	189
32	58	122	180
33C	115	210	325
35	62	104	166
36C	101	158	259
Absentee Vote	69	80	149
Total Votes Cast	3,678	4,293	7,971

Exhibit I**RESOLUTION No. 865**

Resolution of the City Council of the City of Pacifica confirming canvass of returns by City Clerk and declaring result of Consolidated General Municipal Election and Special Municipal Bond Election

Whereas, the City Clerk of the City of Pacifica has duly canvassed the votes cast in the City of Pacifica (hereinafter called the "City") at the consolidated general municipal election and special municipal bond election held on April 12, 1966, in the City, by the electors of the City for the candidates and upon the measures hereinafter set forth, and has certified to this City Council the result of the votes cast at said election for said candidates and upon said measures, which said certificate is now on file in the office of the City Clerk of the City;

Now, therefore, be it resolved by the City Council of the City of Pacifica as follows:

1. Said canvass by said City Clerk as shown by said certification and the result of said election is hereby ratified, confirmed and approved, and the City Council finds and determines that the total number of votes cast in the City at said consolidated general municipal election and special municipal bond election and the total number of votes given in each precinct and by absentee voters of the City for each candidate and for and against said measures was and is set forth in said canvass by said City Clerk.

2. At said election the number of votes cast in the City for each of the candidates (including absentee votes) was as follows:

<u>Office</u>	<u>List of Names of Candidates</u>	<u>Total</u>
Member of City Council	Fred Ballew Incumbent	1,892
	Donald J. McMannis Incumbent	2,029
	Harland Minshew Incumbent	2,864
	Basil I. "Bas" Gladieux Civic Leader- Businessman	1,692
	Nick Gust Local Businessman	2,686
	William R. Hartz General Manager	450
	Robert E. Keating Electrician	482
	George H. Mason, SR. Real Estate	769
	Frank M. Wright Teacher	1,098

3. Harland Minshew, Nick Gust and Donald J. McMannis received the highest number of votes cast for the office for which each was a candidate and said persons were thereby elected to said office for the term hereinabove set forth, and the City Clerk is hereby authorized to sign and deliver thereto a Certificate of Election and to administer thereto the Oath of Office prescribed in the Constitution of the State of California.

4. At said consolidated general municipal election and special municipal bond election the following

measures were submitted to the electors of the City and the number of votes given in the City for and against each of said measures (including absentee votes) was as follows:

	Total Vote "YES"	Total Vote "NO"
MEASURE (A): Shall the City of Pacifica incur a bonded indebtedness in the principal amount of \$1,865,000 for the acquisition of the following municipal improvement, to wit: Public recreational areas, including lands, easements and rights of way necessary or convenient for public recreational areas, parks and beaches for the City of Pacifica?	1,665	3,166
MEASURE (B): Shall the City of Pacifica incur a bonded indebtedness in the principal amount of \$300,000 for the acquisition of the following municipal improvement, to wit: Civic center site, including lands, easements and rights of way necessary or convenient for a civic center site for the City of Pacifica?	1,354	3,449
MEASURE (C): Shall the Housing Authority of the County of San Mateo develop, construct and acquire in the City of Pacifica, with Federal financial assistance, a low rent housing project or projects of not to exceed in the aggregate of 200 dwelling units for living accommodations designed specifically for elderly persons of low income?	1,834	2,993

5. That less than $\frac{2}{3}$ of all of the votes cast at said election on said Measure A were in favor of said measure and that said measure failed to pass.

6. That less than $\frac{2}{3}$ of all of the votes cast at said election on said Measure B were in favor of said measure and that said measure failed to pass.

7. That less than a majority of all of the votes cast at said election on said Measure C were in favor of said measure and that said measure failed to pass.

Passed and adopted April 19, 1966, by the following vote:

Ayes: Councilmen Ballew, McCarthy, McMannis, Minshew and Mayor Fox.

Noes: None.

Absent: None.

/s/ James A. Fox
Mayor of the City of Pacifica

Attest:

/s/ Karl A. Baldwin
City Clerk

(Certifications to Resolution omitted)

Exhibit J

AFFIDAVIT

State of California,
County of San Mateo—ss.

William G. Weman, being sworn, says:

I am the Executive Director of the Housing Authority of the County of San Mateo. This agency is formed under the Health & Safety Code Sec. 34200-34521 of the State of California. Its purpose is to locate in the county decent, safe and standard living quarters for low-income individuals and families. There is no other public agency to deal with the housing problems of the poor.

The Housing Authority cannot effectively carry out its charge to provide decent, safe and standard housing for low-income families unless it can gain access to the available Federal funds for acquisition and construction, and this in turn cannot be done as long as Article XXXIV of the State Constitution remains in effect. It is the belief of the affiant that fear by middle and above income residents of a devaluation of property, coupled with social fears of minority and low-income family influx, preempts a possibility of a successful referendum.

In this very affluent county the possibility of referendum passage is highly remote. Two attempts were made to the voters of the City of Pacifica on the question of Senior Citizens housing—both failed. A referendum called in the City of Half Moon Bay in

1961 on the question of a 50-unit locally funded (non-federal) Senior Housing was successful because of local interest. Today, however, passage would be very doubtful on a question of Senior Housing, and would be overwhelmingly defeated on the question of "public housing."

Because Article XXXIV requires a local referendum on the question of building or acquiring housing, this agency is restricted to utilizing a leasing program financed by the Federal Government under Section 23, as amended, of the 1937 Housing Act. Some cities in this county are concerned about the "effect" of our leasing program in their areas. By State and Federal law an enabling resolution must be obtained from the governing body of each legal entity prior to providing the rental subsidy to residents. The City of Menlo Park, after authorizing an enabling resolution on July 25, 1967, two years later has placed a Moritorium on the program in that city. This has resulted in a lawsuit yet unresolved.

Housing Authorities were set up because private industry was proving incapable of providing housing within the financial reach of low-income persons. Article XXXIV brings the situation back to the way it was—it is left to private industry to produce low-cost housing, and they are unable to do so because of the interest rates, high labor and material costs, etc.

Our present situation is highly critical. Although our leasing program has housed some 650 families throughout the county, we still have over 2,000 fami-

lies on the waiting list for public housing. Applications are being taken by appointment only, with the appointment list presently running through December, 1969. A zero rental vacancy factor now exists in this county.

There are federally funded programs that could be utilized to relieve this very serious situation, but we are estopped by the existence of Article XXXIV of the State Constitution.

/s/ William G. Weman,
Executive Director.

Subscribed and sworn to before me this 23rd day
of September, 1969.

(Seal)

Betty W. Carroll,
Notary Public in and for the
County of San Mateo, Calif.
My commission expires May 13, 1973.

Exhibit A

[Title of Court and Cause]

**AFFIDAVIT IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT****AFFIDAVIT OF ELAINE EISENBERG**

State of California,
County of San Mateo—ss.

Elaine Eisenberg, being duly sworn, deposes and says:

I am a citizen of the United States and have resided in San Mateo County for about 21 years. After Proposition 14 was passed, the Fair Housing Council of San Mateo County was established, and I served as Chairman of the Housing Committee for two years, from 1965 to 1967. We placed ads in newspapers, notifying people of the existence of the Fair Housing Council, and attempts were made to find housing for black families.

Common reactions from realtors and homeowners in the County was "wouldn't they be happier with their own people," "I will show you where blacks can rent—in black ghetto areas," "I personally have no bias, but my neighbors would object," "my other tenants would move out," or flat "no's." These discriminatory attitudes were and still are widespread throughout the County.

The emphasis was always on finding houses and apartments to rent, because minority persons did not have enough money to buy homes. Several inquiries were taken from low income families, but nothing at all could be done for them, because the rentals in San Mateo County are quite high.

There has been no real change in attitude, even now with Proposition 14 off the books. I am presently a member of the Housing Sub-Committee of the San Mateo County Human Relations Commission, and I am personally aware that cases of discrimination against blacks in housing exist today in the County. Some of those persons discriminated against are black teachers, actively being recruited by school districts in the County; and others are persons unable to keep jobs and work because they cannot find a place to live.

When Proposition 14 was in effect, I received many threatening calls from persons who did not want equal opportunity in housing, and blacks received flat denials when they attempted to find houses; while this overt prejudice is not as apparent today, the underlying discrimination is. The practices are more subtle, and evasive, but the result is the same. I am sure these discriminatory attitudes caused and will cause the failure of referendum on public housing in the County. The desire to keep blacks with money out of white neighborhoods is even stronger when the blacks are persons of low income. The housing problem today is critical.

Dated: October 23, 1969.

Elaine Eisenberg,

Subscribed and sworn to before me this 23rd day of October, 1969.

(Seal)

/s/ Esther M. Larsen,

Notary Public in and for the

County of San Mateo, Calif.

My commission expires Nov. 23, 1970.

Exhibit B

[Title of Court and Cause]

**AFFIDAVIT IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT**

AFFIDAVIT OF GAY LEAH SWENSON

State of California,
County of San Mateo—ss.

Gay Leah Swenson, being duly sworn, deposes and says:

I am a citizen of the United State and a resident of San Mateo County. I have long been aware of the problems of discrimination against black families and persons in housing, and I have been actively working with fair housing groups since 1965. When Proposition 14 was in effect, I worked on a fair housing campaign with the Fair Housing Council of San Mateo County. There were numerous cases of discrimination against black families, and this discrimination continues today. I am presently on the Board of Directors of the San Mateo County Fair Housing Council, and I worked in addition with the Belmont Citizens For Equal Opportunity and the Belmont-San Carlos Social Justice Committee in attempting to secure decent housing for blacks.

Discriminatory practices today include prohibitive extra costs and requirements imposed on leases if blacks wish to rent, but not imposed for white applicants. Expressions of concern for neighbor's feelings, and economic devaluation of property are still articulated as rationalizations for refusals to rent.

There is an unwritten law that West of El Camino Real is verbotem for blacks.

One of the groups most affected in San Mateo County are black teachers. The San Mateo County Union High School District Newsletter stated that black teachers are unable to find housing because of discrimination in the County, and the San Mateo Times reported that black teachers had such difficulty finding homes that they were not able to take jobs in the County and went home. Most of the black teachers live in the black ghettos, where housing is overcrowded, badly rundown and where the vacancy factor is very low. In white neighborhoods where there are vacancies black persons are commonly told that apartments have been rented, even though it was determined before that the apartment was available.

Discrimination against black persons who have money also militates against favorable votes on housing for low income persons, who are largely from the black community.

Fair housing committees exist because discrimination exists, and people who are concerned wish to do anything and everything possible to provide equal opportunity in housing.

Dated: October 27, 1969.

/s/ Gay Leah Swenson

Subscribed and sworn to before me this 27th day of October, 1969.

(Seal)

/s/ Betty W. Carroll,
Notary Public in and for the
County of San Mateo.

My commission expires May 13, 1973.

Exhibit C

[Title of Court and Cause]

**AFFIDAVIT IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT****AFFIDAVIT OF JANET REFVEM**

State of California,
County of San Mateo—ss.

Janet Refvem, being duly sworn, deposes and says:

I am a citizen of the United States and have been a resident of San Mateo County for about 14 years. My experience with the problems faced by low-income families in obtaining housing began in 1966 when Community House, an organization funded by the Mid-Peninsula Christian Ministry and located in East Palo Alto, formed a Housing Committee out of deep concern for the black residents of that community. I worked with Community House for several years, and I accepted the Chairmanship of the Housing Committee.

East Palo Alto is a black ghetto, beset with the problem of overcrowding and substandard housing at high rentals. The residents cannot move out of the neighborhood because of lack of funds and because of discrimination against blacks in white neighborhoods.

I have attended, and still attend meetings of the Housing Authority in San Mateo County, and have attempted to force them to develop public housing in the County. Black families appeared to speak at the meetings and told of their difficulties in obtaining housing due to high rentals, discrimination and a low vacancy factor. Black mothers have had to place their children in foster homes because they could not find

decent, safe and sanitary housing. The Housing Authority's repeated response is that no public housing can be developed because Article XXXIV of the California State Constitution requires a referendum, and a referendum would fail.

The Housing Committee prepared an intensive report detailing the critical need for public housing. The Housing Committee of the Human Relations Commission of San Mateo County, of which I am a member, is also studying the problem. A group to which I belong, the County Committee For Community Development, an advisory committee for the San Mateo County Board of Supervisors, has also studied and reported the vital need for housing for persons of low income in the County. This need was found to be particularly great in the poverty pockets of Redwood City, Daly City, East Palo Alto and East Menlo Park, areas largely inhabited by black and Mexican-American families. Article XXXIV is causing those persons to continue to live in demoralizing conditions. Their right to safe and sanitary housing should not suffer because of the prevailing discriminatory attitudes in the County. The removal of Article XXXIV would at least give the poor and the minority the chance to have a decent life.

Dated: October 28, 1969.

/s/ Janet Refvem

Subscribed and sworn to before me this 28th day of October, 1969.

(Seal)

/s/ Betty W. Carroll,
Notary Public in and for the
County of San Mateo.

My commission expires May 13, 1973.

Exhibit D

[Title of Court and Cause]

**DECLARATION OF ATTORNEY IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT**

I, Andrew H. Field, declare as follows:

I am a citizen of the United States and have been a resident of San Mateo County since 1961. My family resided in Pacifica from 1961 to 1964 and in the unincorporated area known as the San Mateo Highlands since 1964. While in Pacifica I was Chairman of Pacificans for Fair Housing, an organization formed in the spring of 1964, primarily to disseminate information for the purpose of persuading citizens to vote against Proposition 14.

Since 1965, I have been President of the Fair Housing Council of San Mateo County. Since 1965, I have been a representative of the Housing Opportunities Committee of the Council for Civic Unity of the San Francisco Bay Area. The Housing Opportunities Committee has been a federation of the approximately 22 organizations in the San Francisco Bay Area whose major objective is working toward open housing and elimination of discrimination in the sale and rental of housing on the basis of color or ethnic background.

Since August, 1968 I have been Chairman of the San Francisco Barristers' Panel on Discrimination in Housing. Through this Panel I have received referrals of many cases of alleged discrimination, pri-

marily in the rental of housing. Members of the Panel have filed several actions in the United States District Court for the Northern District of California on behalf of black citizens, alleging violations of various federal and California statutory provisions with respect to discrimination in housing.

Both the Fair Housing Council of San Mateo County and the Housing Opportunities Council have provided a service whereby persons who have experienced or anticipate having difficulty in obtaining housing because of racial discrimination can obtain assistance in locating suitable housing which will be open to them and can also establish whether refusals to sell or rent are based upon racial discrimination.

My own experience has included making telephone calls and personal appearances for the purpose of determining whether racial discrimination was the basis for refusing to sell or rent housing. My personal experience with dozens of apartment house managers, apartment house owners, real estate brokers and salesmen, and residential building contractors has indicated that racial discrimination in housing in San Mateo County has been and continues to be almost universally present among persons in the housing industry. With the exception of a very few apartment house owners and managers and the 1965 statements by companies controlled by Carl Gellert in connection with construction of homes at Serra Monte, racial discrimination is not stated as the reason for a refusal to rent or sell housing to members of racial minorities. It has been my personal experience that

refusals ostensibly based upon economic or other grounds are, upon investigation, actually based upon racial discrimination.

From my experience as an attorney, as a participator in negotiations for the purpose of obtaining agreements from persons in the housing industry to publicize pledges to provide open housing, upon investigation through "testing" and other means, and from discussions with individuals and groups in the housing industry as to the basis for refusals to rent or sell housing, I have formed the opinion that discrimination in housing in San Mateo County on the basis of race and ethnic background prevails throughout the housing industry. I have also formed the opinion that the major method by which laws against open discrimination are evaded is by making most housing in San Mateo County economically beyond the means of most members of racial minority groups. It is my opinion that a referendum within the county or any city in San Mateo County, with respect to proposed low income housing would result in the primary issue being the admission or exclusion of members of racial minority groups. Based upon my experience within the county, it is my opinion that such a referendum would be defeated in every jurisdiction within the county.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Mateo, California, October 28, 1969.

/s/ Andrew H. Field

Exhibit E

[Title of Court and Cause]

**AFFIDAVIT IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT**

AFFIDAVIT OF ELIZABETH LYMAN

State of California
County of San Mateo—ss.

Elizabeth Lyman, being duly sworn, deposes and says:

I am a citizen of the United States and a resident of Stanford, Santa Clara County. When the California Real Estate Association proposed and advocated Proposition 14, I personally called area realtors and told them why I was against the Proposition; and as a member of the Mid-Peninsula Citizens Against Proposition 14, I was able to wage a more elaborate campaign.

When the battle against Proposition 14 subsided, persons working with Mid-Peninsula Citizens Against Proposition 14 formed the Mid-Peninsula Citizens for Fair Housing in order to continue the fight for equal opportunity in housing. While that group was originally organized solely to encourage ethnic equality, it soon became apparent that very real problems pervaded the area of low-income housing as well. We

began to concentrate our efforts toward encouraging the development of decent, safe and sanitary public housing. Unfortunately, these efforts were largely thwarted by the operation of Article XXXIV. Housing Authorities and Municipal Governments claimed that public housing could not be developed because referendum on low-income housing would fail; individuals expressed concern about complexes of low-income housing going up in their neighborhoods with large numbers of black persons. A typical comment was, "I have nothing against a black family living next door, but I don't want a complex of them."

I have not lessened my efforts. I am presently a board member of the Peninsula Citizens for Fair Housing, and I am on the Executive Committee for Citizens for Mutual Understanding, an organization which primarily attempts to educate and expose the community to the concerns of unfair discrimination and unequal opportunities for housing; I am, as well, on the Fair Housing Task Force of the Stanford Mid-Peninsula Urban Coalition, and the Housing Sub-Committee of the San Mateo County Human Relations Commission.

In various ways, each group is trying to do something about the widespread discrimination in housing against blacks and persons of low income. I believe that discriminatory attitudes have effectively stopped public housing development on the peninsula, and the

removal of Article XXXIV would lend substantial support to our efforts in securing fair housing for all.

Dated: October 28, 1969.

/s/ Elizabeth Lyman

Subscribed and sworn to before me this 28th day of October, 1969.

(Seal)

/s/ Betty W. Carroll,
Notary Public in and for the
County of San Mateo, Calif.
My commission expires May 13, 1973.

Exhibit F

[Title of Court and Cause]

**AFFIDAVIT IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT**

AFFIDAVIT OF BRAD REESE

State of California

County of San Mateo—ss.

Brad Reese, being duly sworn, deposes and says:

I am a citizen of the United States and a resident of Menlo Park, San Mateo County. From 1960 to 1965 I worked with the Fair Play Council, an organization which attempted to find housing for black persons. It was impossible to find housing in other than black ghettos. The response was always, "These homes are sure not for Negroes." My experience as Housing Chairman for the NAACP of South San Mateo County, as Co-Chairman of the Housing Committee of Citizens Against Racism in Redwood City, and as a member of the Housing Committee of the Human Relations Commission in San Mateo County has been the same. Owners and landlords are now aware that the law is against them, so they are subtly evasive—there are no outright refusals but instead, fishy stories. Blacks are continually told that apartments were just rented, even though later checks reveal that they are still available; owners don't open the door when they see that blacks are ringing the doorbell; realtors require black persons to go through long, detailed credit checks, and don't require the same for

white applicants; they also claim no one is available to show an apartment, or claim the apartment keys were misplaced. The worst practice occurs when landlords ask black applicants very personal, probing questions which invariably cause the applicants to leave. Many blacks become so discouraged they give up trying.

We have received many requests from persons of low income for help in obtaining housing, but we had to tell them we could do nothing. There is no housing available for them in the black ghettos which are filled to capacity; and even apart from discrimination, they cannot afford the rents in white neighborhoods.

I would not expect any community in this County to vote for a low-income housing project—the poor and the black are very distasteful to the white middle class. This would apply as well to Mexican-Americans. I don't know how it will be possible to provide housing for the poor unless Article XXXIV of the California State Constitution were no longer on the books.

Dated: October 29, 1969.

/s/ Brad Reese.

Subscribed and sworn to before me this 29th day of October, 1969.

(Seal)

/s/ Betty W. Carroll,
Notary Public in and for the
County of San Mateo, Calif.
My commission expires May 13, 1973.

Exhibit G

[Title of Court and Cause]

**AFFIDAVIT IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

AFFIDAVIT OF DR. HAVEN RICHARD DOANE

State of California

County of San Mateo—ss.

Dr. Haven Richard Doane, being duly sworn, deposes and says:

I am a citizen of the United States, and I have resided in San Mateo County for approximately 11 years. My formal involvement with fair housing began in 1964 when I worked with the County Committee Against Proposition 14. That organization attempted to counter the property rights versus human rights argument advocated by the real estate interests. When Proposition 14 passed, I worked with the Fair Housing Council of San Mateo County, which picketed segregated housing developments in the County, and made other attempts to encourage equal opportunity in housing.

In 1966 I assumed the Chairmanship of the Housing Sub-Committee of the Conference on Religion, Race and Social Concern. The Committee received numerous reports from the Information Centers around the County, about the overcrowded and sub-standard housing of low income persons. Many of those persons were being evicted, thrown out on the street, and unable to find other housing because of the

low vacancy rate. We were very much concerned about these problems, and were largely instrumental in getting the Leased Housing program set up in the County. Because of the continued widespread discrimination in San Mateo, the Leased Housing program has not been able to alleviate the critical housing shortage. People know that a federally-funded program imposes a fair housing requirement and so they do not wish to lease their homes to the Housing Authority.

I am presently the Chairman of the Council of Churches Housing Development Corporation, an organization whose primary purpose is to develop low-income housing in the County. The Committee obtained an option on 30 acres in Half Moon Bay for the purpose of developing a low-income housing project. The City Council of Half Moon Bay held a public meeting to discuss the proposal. Before the meeting was held, there were inflammatory newspaper accounts with undercurrents of discrimination, stating in effect that if a project were built Half Moon Bay would be turned into a ghetto. These sentiments were repeated at the meeting. It was clear that the residents wanted no part of a low-income project and our chances of developing one are almost zero. A referendum on such a project would surely fail.

Six months ago, I wished to sell my own home in the County, and I asked a realtor to place an ad listing it along with a statement that all persons could buy regardless of race. He refused to do so, stating that he would be in trouble with the Realtors Organi-

zation, and that other persons would refuse to list their properties with him—and this was a man who was rather sympathetic to the problems.

It is clear that discrimination abounds both in rentals and sales of homes to black persons, and the referendum requirement of Article XXXIV of the California Constitution for low-income housing allows these discriminatory attitudes to deprive poor persons of their right to safe, decent and sanitary housing.

Dated: October 29, 1969.

/s/ Dr. Haven Richard Doane

Subscribed and sworn to before me this 29th day of October, 1969.

(Seal)

/s/ Ruth A. Dyra,

Notary Public in and for the
County of San Mateo, Calif.

My commission expires June 21, 1971.

Exhibit H

[Title of Court and Cause]

**AFFIDAVIT IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

AFFIDAVIT OF JOHN RUTHERFORD

State of California

County of San Mateo—ss.

John Rutherford, being duly sworn, deposes and says:

I am a citizen of the United States and a resident of Santa Clara County. In 1964 I joined with the Mid-Peninsula Citizens Against Proposition 14 in attempting to inform the community that Proposition 14 would, in effect, give constitutional sanctity to racial discrimination. While we were successful in beating the Proposition in some areas, San Mateo County gave the Proposition a favorable vote. A certified copy of election results is attached hereto. After the election, the above group, renamed the Mid-Peninsula Citizens for Fair Housing, continued its efforts in trying to secure equal opportunity in housing through educational programs and legal action.

I am presently the Chairman of the Urban Coalition Task Force on Fair Housing, a member of the Housing Committee of the Human Relations Commission of San Mateo County, and a member of the Mid-Peninsula Citizens for Fair Housing. While Proposition 14 was ultimately declared unconstitutional, our case files show that discrimination against

blacks in housing is still widespread in San Mateo County. Outright refusals based on racial prejudice still occur, but most of the practices are more subtle. These include the jacking up of rents, difficulty in obtaining credit, having to pay the list rather than negotiated price, evasive techniques, and humiliating questioning.

A survey conducted in 1967 by the United States Navy, which covered San Mateo County and other communities, indicates that in San Mateo County there were many instances of hardcore discrimination—where persons refused to rent houses to black individuals or families. The survey indicates that 400 units discriminated against black persons; a partial list is attached.

Racial prejudice, coupled with economic prejudice, has been causing the failure of referendum on low-income housing. Article XXXIV of the California State Constitution is a decided deterrent to the development of public housing, which is greatly needed, and must be removed. As reported in the Realty Review, a publication of the San Jose State College, the vacancy factor in rentals dropped two years ago to 1%; because of their economic status, persons of low income are the ones substantially affected by the shortage.

My personal experience with the black ghetto in East Palo Alto shows that houses are overpriced and overcrowded; the roads are bad, and municipal services are deplorable. Unless public housing is provided, these people cannot move out and better their living

conditions; blacks and Mexican-Americans largely make up the low-income group in the whole of San Mateo County. It is unconscionable that federal money, which is available to provide decent, safe and sanitary housing for persons of low income, cannot be utilized because of discriminatory attitudes allowed and, indeed, mandated by the California Constitution.

Dated: November 3, 1969.

/s/ John B. Rutherford

Subscribed and sworn to before me this 3rd day of November, 1969.

(Seal)

/s/ Betty W. Carroll,
Notary Public in and for the
County of San Mateo, Calif.

My commission expires May 13, 1973.

Discriminatory Housing Moffett Field list referred to in Rutherford affidavit is omitted from this appendix but can be found in the record on appeal.

Page No. 17 16 15 14 13 12 11
GENERAL ELECTION, NOVEMBER 3, 1964
COUNTY OF SAN MATEO
RESULT OF VOTES CAST

15TH ASSEMBLY DIST	PRECINCT NUMBER	PERFORMANCE OF MUNICIPAL FUNCTIONS BY COUNTY OFFICIALS		PROPERTY TAXATION RELIEF IN EVENT OF DISASTER		CONSERVATION AMENDMENTS		NAMING CORPORATIONS		SALES AND RENTALS OF RESIDENTIAL REAL PROPERTY		TELEVISION PROGRAMS		LOTTERY		RAILROAD TRAIN CREWS	
		YES	NO	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO
	ALAMEDA	2257	368	1382	1418	1952	764	1361	1604	1137	2418	2124	752				
	ATHLINGTON	2897	506	1516	2090	2444	1084	2197	1593	1870	3116	3230	513				
	BAY	2634	789	2673	1246	2577	1355	1390	3180	1072	2920	2134	2210				
	BELMONT	5831	1334	4196	3622	5309	2137	4905	3370	2208	6125	2495					
	BLYNDEN OUT	281	74	202	173	275	92	233	159	138	298	249	141				
	PARALLONE	350	103	315	196	310	176	343	219	152	381	308	237				
	CRANADA	331	98	308	173	273	158	354	168	138	323	282	209				
	HALF MOON B	591	178	521	336	545	277	620	381	245	593	555	373				
	HUR OUT	56	28	63	41	65	33	89	41	28	80	67	55				
	HILLSBOROUGH	2796	530	1410	2104	2472	927	2370	1326	1727	3072	3229	414				
	LA MONDA	184	60	175	101	173	407	175	123	96	584	189	109				
	LAKE	1134	301	792	771	1025	38	968	680	488	1227	1084	528				
	LCS TRANCOS	143	20	115	66	133	38	65	121	97	147	122	61				
	PEALO OUT	1401	277	1013	844	1273	480	975	1016	744	1539	1453	487				
	TERLO PARK	8556	1602	5730	5354	7878	3240	8912	6388	4272	9390	3084					
	CAES	2094	703	1915	1234	2001	985	2128	1334	703	2287	1764	1550				
	PISCADERO	122	53	136	77	114	72	174	76	76	149	155	81				
	PORTOLA	1298	177	705	864	1097	414	790	868	751	1376	1364	255				
	REDWOOD CITY	13845	4140	10807	8961	13265	5694	13161	8307	5040	15319	13215	7546				
	SAN CARLOS	7734	2436	5539	5426	7435	3078	7451	4292	3149	8986	8246	3192				
	SAN GREGORIO	32	17	37	23	39	19	50	19	8	38	50	20				
	SAN MATEO	15142	3606	10640	10318	14005	5522	8681	6681	6338	16648	15427	5894				
	SAN MATEO OUT	1472	240	916	896	1259	502	872	1044	700	1349	1474	392				
	SELEY	1021	276	817	661	941	444	993	590	411	1121	996	818				
	KEYWOOD	49	6	26	33	44	16	25	35	38	54	52	10				
	SKYLINE	219	60	175	123	213	86	175	145	122	243	225	87				
	SUNSHIT	316	81	186	227	309	103	253	192	148	360	334	102				
	WOODSIDE	1497	301	906	1038	1340	555	1241	826	846	1638	1637	379				

ATHERTON	2257	506	1382	2080	1952	1361	1593	1787	1537	501	2418	2124	752
RAY	2897	1516	1516	2444	2444	2199	1809	1870	607	3116	3116	3230	513
RELMONT	2634	789	2673	1246	2577	1355	3180	3338	1072	2920	2920	2134	2210
RELMONT OUT	1332	4196	3622	5309	92	4905	3370	5913	2200	1975	6125	5536	2495
PARALLONE	281	74	202	173	275	92	233	254	138	94	295	249	141
CRANADA	350	103	315	195	310	176	303	405	152	153	381	308	237
HALF MOON B	331	98	308	173	275	158	354	377	138	179	323	202	209
OVER OUT	591	178	321	336	545	279	381	740	245	337	593	555	373
WILLECROUCH	56	28	63	41	65	33	89	105	28	37	80	67	55
LA HONDA	2796	830	1410	2104	2472	927	1326	1949	1727	584	3072	3229	414
LAKE	184	60	175	101	173	83	123	199	96	102	189	178	109
LCS TRANCOS	1134	301	792	771	1035	407	680	1151	488	388	1227	1084	828
MENLO OUT	143	20	115	66	133	38	121	89	97	38	147	122	61
MENLO PARK	1401	277	1013	844	1273	480	1016	1214	744	406	1539	1453	487
	8536	703	5730	7876	8912	7632	2294	6648	4272	3084	8648	8648	3084
GARS	2094	53	1915	1234	2001	985	1334	2702	76	1033	2287	1784	1550
PISCADERO	122	177	136	77	114	72	174	168	81	1376	149	152	81
PORTOLA	1298	4140	705	864	1097	414	868	886	751	257	1376	1364	255
REDWOOD CITY	13845	10807	8964	8964	13265	5694	8307	5040	15319	8504	13215	7546	7546
SAN CARLOS	7734	2436	5539	5426	7435	3078	4292	16200	3149	2488	8986	8246	3192
SAN GREGORIO	32	17	37	23	39	19	50	57	8	20	38	80	20
SAN MATEO	15142	3606	10310	14005	5522	8681	13373	15465	6338	16648	15427	8894	8894
SAN MATEO OUT	1472	240	916	896	1259	502	1040	1193	700	1549	1549	392	392
SELBY	1021	276	817	661	941	444	590	1140	411	329	1121	1474	918
SEYFOOD	49	6	26	33	44	16	35	25	38	6	84	52	10
SKYLINE	219	60	175	123	213	86	145	122	243	73	243	226	87
SUMMIT	316	81	186	227	309	103	192	197	148	90	360	334	102
WOODSIDE	1497	301	906	1038	559	828	846	1190	846	1638	1637	379	379
26TH	18362	48406	28743	46679	32832	24328	74173	31693	31693	31693	31693	31693	31693
TOTAL	74271	32616	68538	62544	75064	24328	74173	31693	31693	31693	31693	31693	31693
ABSENTEE	3330	1688	4442	1508	3558	1634	2693	3671	2637	2335	3944	4418	1381
26TH	20047	49914	30377	49372	38484	65827	33074	33074	33074	33074	33074	33074	33074
TOTAL	77601	57058	72093	66225	78638	26743	78591	37107	37107	37107	37107	37107	37107
27TH	18202	54691	36277	28356	28304	36153	28594	28594	28594	28594	28594	28594	28594
TOTAL	64272	18202	54691	36277	28356	28304	36153	28594	28594	28594	28594	28594	28594
27TH	38249	11749	130349	56191	56681	129480	85525	51084	51084	51084	51084	157599	70181
COUNTY TOTAL	141875	11749	130349	56191	56681	129480	85525	51084	51084	51084	51084	157599	70181

STATEMENT OF RESULT OF VOTES CAST

GENERAL ELECTION, NOVEMBER 3, 1964

Page No.

County of San Mateo	11	12	13	14	15	16	17	
	PERFORMANCE OF MUNICIPAL FUNCTIONS BY COUNTY OFFICERS	PROPERTY TAXATION: RELIEF IN EVENT OF DISASTER	CONSTITUTIONAL AMENDMENTS	SALES AND RENTALS OF RESIDENTIAL REAL PROPERTY	TELEVISION PROGRAMS	LOTTERY	RAILROAD TRAIN CREWS	
PRECINCT NUMBER	YES	NO	YES	NO	YES	NO	YES	NO
27TH ASSEMBLY DISTRICT								
BRISBANE	624	244	567	349	779	304	452	585
BROADMOOR	1477	437	1390	633	1544	776	713	1547
BURLINGAME	8263	2056	8467	3195	7870	4523	3605	9267
BLOME HILLS	476	89	330	174	264	221	78	836
CLUB	55	20	34	29	357	19	25	57
COLMA	96	35	51	43	76	52	35	90
CALY CITY	13895	3894	7421	6331	111	7958	63	103
ESTERO	124	28	75	60	100	67	46	121
HILLSBOROUGH	243	54	198	80	108	111	142	268
HILLBRAE	5712	1435	3516	2375	217	2900	48	293
PACIFICA	6284	1699	3101	2801	5604	6021	2018	6310
SAN BRUNO	8880	2432	5033	3840	6090	3326	3177	6060
SAN MATEO	6711	1730	3715	2722	8843	4700	3879	9242
SC SAN FRAN	9104	2851	8156	4472	5345	10091	2793	6972
WESTBOROUGH	576	154	254	247	9997	4775	4740	9481
27TH	17188	38533	27343	34926	618	312	290	852
TOTAL	62528	32176	36341	61030	70240	27785	58455	58455
APSENTEE VOTE	1744	1044	1915	963	2228	1227	1406	2002
27TH	18202	36277	28304	36183	2131	25598	47215	37107
TOTAL	64272	54691	36256	63285	72371	39191	58708	58708
STATE OF CALIFORNIA								
COUNTY OF SAN MATEO								
I, MARVIN CHURCH, County Clerk of the above named county, do hereby certify								
that the within is a true and correct Statement of the result of the Votes								
cast in this County on Proposition 14 at the General Election held								

STATE OF CALIFORNIA)

COUNTY OF SAN MATEO)

I, MARVIN CHURCH, County Clerk of the above named county, do hereby certify that the within is a true and correct Statement of the result of the Votes cast in this County on Proposition 14 at the General Election held

	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO
BRISBANE	624	244	667	308	567	349	779	304	822	237	452	585	530	509				
BROADMOOR	1477	437	1290	834	1390	633	1644	776	1706	561	713	1547	1315	931				
BURLINGAME	8263	2056	5816	8467	7621	3195	7870	4523	8557	3605	2746	9267	8601	3378				
BURGH HILLS	478	89	250	330	401	174	357	264	393	221	79	536	538	67				
CL'D	55	20	83	34	51	29	76	19	69	25	35	87	52	37				
COLMA	96	35	93	61	90	43	111	52	113	48	63	90	103	51				
DAILY CITY	13895	3894	12157	7421	12370	6331	13557	7958	13408	6730	6710	14128	12056	8676				
ESTERO	124	28	85	75	102	60	100	67	111	55	46	121	109	51				
HILLSBOROUGH	243	54	112	198	223	80	217	108	176	142	48	268	293	26				
VILLBRAE	5718	1435	4331	3316	5200	2375	5604	2900	6021	2343	2018	6310	5680	2590				
PACIFICA	6284	1698	5739	3101	5514	2801	6090	3326	6953	2343	3177	6060	8069	4053				
SAN BRUNO	8880	2432	7432	5033	8009	3840	6090	4700	10091	3308	3879	9242	7959	5126				
SAN MATEO	6711	1730	5506	3715	6129	2722	5343	4840	7799	2193	2793	6972	5850	3922				
TO SAN FRAN	9104	2851	8127	8156	4472	4472	9997	4775	11364	3244	4740	9481	7773	6446				
WESTBOROUGH	576	154	810	254	247	247	840	512	618	438	290	852	537	397				
27TH	17188	17188	38833	38833	27341	27341	34928	34928	11364	24378	65213	7773	36187					
TOTAL	62525	32178	56341	56341	61030	61030	70240	70240	27795	28465								
APSENTEE VOTE	1744	2044	2518	744	1915	963	2228	1237	2131	1217	1406	2002	2243	950				
27TH	18202	36277	38304	38304	36183	36183	25598	25598	47218	37107								
TOTAL	64272	84691	58256	58256	63255	63255	72371	72371	29191	28708								

STATE OF CALIFORNIA
COUNTY OF SAN MATEO

I, MARVIN CHURCH, County Clerk of the above named county, do hereby certify that the within is a true and correct Statement of the result of the Votes cast in this County on Proposition 14 at the General Election held November 3, 1964, as determined by the official canvass of the returns of the said election.

WITNESS my hand and official seal this 30th day of October, 1969.

MARVIN CHURCH, County Clerk

By *May A. Lister*
Deputy

This image shows a blank page from a document. There are faint, illegible markings across the page, which appear to be bleed-through from the reverse side. On the right side, there is a vertical strip of dark material, possibly representing the binding or gutter of a book. The overall appearance is that of a scanned page from an old or worn document.

Exhibit I

Title of Court and Cause]

AFFIDAVIT IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT

AFFIDAVIT OF DOVIE RUTH WYLIE

State of California

County of San Mateo—ss.

Dovie Ruth Wylie, being duly sworn, deposes and says:

I am a citizen of the United States and a resident of San Mateo County. I am presently employed as Planner I of the San Mateo County Planning Commission. My job involves working with census data, and working on the Community Concern Study, the part of the general Plan Revision Program of San Mateo County which will attempt to define and incorporate the human element—what the people in the community think are the County's problems.

In April, 1969, the County of San Mateo requested that the California State Department of Finance conduct a Special Census in most of the unincorporated parts of the County, and in 10 of the 18 cities, in order to obtain a more accurate estimate of the total county population. This census was taken, and for areas in the County not surveyed, updated data was provided. Each city or unincorporated area had the option of including Special Data Questions, in addition to the Standard Questions. That list of Special Questions is attached to my affidavit.

In all areas a question relating to income level was asked, and in some areas a question relating to race was asked. The data has not been professionally evaluated to determine correlations between race and income, but such an evaluation can be done.

A relationship can be made, without professional evaluation, between race and income in East Palo Alto where the area is largely made up of black families. In areas where there are concentrations of black families, the median family income is markedly lower than in areas of white family concentration.

Based on my experience, I have formed the opinion that there are, in other areas of the county, a large number of black and Mexican-American families and individuals of low income; and I believe that if there was a professional evaluation of the cards processed in our special Census, it would support this opinion.

Dated: November 3, 1969.

/s/ Dovie Ruth Wylie

Subscribed and sworn to before me this 3rd day of November, 1969.

(Seal)

/s/ Betty W. Carroll,
Notary Public in and for the
County of San Mateo, Calif.

My commission expires May 13, 1973.

of

Shenandoah

Exhibit J

[Title of Court and Cause]

**AFFIDAVIT IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

AFFIDAVIT OF EMILY MARKS SKOLNICK

State of California
County of San Mateo—ss.

Emily Marks Skolnick, being duly sworn, deposes and says:

I am a citizen of the United States, and have been a resident of San Mateo County for 21 years. I have long been engaged in the fight for civil rights and equal opportunity. One of my first efforts, about eighteen years ago, was revitalizing the Mid-Peninsula Council for Civil Unity, an organization established to provide equality of right and opportunity regardless of race, religion, or ancestry. That organization set up a Fair Housing Committee, because blacks and orientals were unable to obtain housing in other than a few areas in the City of San Mateo. I am sad to say the situation today is very much the same.

I worked with the Mid-Peninsula Citizens Against Proposition 14 as Chairman of the Speakers Bureau, and I am presently a member of the Mid-Peninsula Citizens for Fair Housing. I work with the Council on Race, Religion and Social Concern, an organization which is encouraging equal opportunity in housing for blacks and for the poor; I worked as a member

of the Citizens' Advisory Board to the Fair Employment Practice Commission in California, working for fair employment as well as fair housing. I am the Vice-Chairman of the City of San Mateo's Human Relations Commission, and a member of the Urban Coalition Task Force on Fair Housing.

My efforts for equal opportunity have increased rather than decreased, because of the continued widespread discrimination in San Mateo County against blacks. I am personally aware that blacks are still denied housing because of their race. Black professionals, teachers, and mostly the poor suffer from this discrimination. The Director of the San Mateo County Housing Authority stated at a public meeting of the City of San Mateo's Human Relations Commission on September 30, 1969, that the Authority was unable to provide necessary low-cost housing because of Article XXXIV of the California State Constitution. He repeated this statement today at a public meeting held by the Board of Supervisors of San Mateo County, held to investigate the crisis of low-cost housing. The Director declared in addition that the County was indeed in a housing crisis with no available units to rent to low-income persons. I was at this meeting because on November 3, 1969, the City Council of San Mateo passed a resolution stating that the unavailability of adequate housing at a cost that can be met constitutes a grave threat to the well being of many of its citizens, and urged the Board of Supervisors, legislators, and HUD to increase their efforts to deal with the problem immediately. The City

Council found that many families resident in the City of San Mateo had insufficient income to pay for adequate housing.

A referendum in this County on public housing would absolutely fail because of prejudice against blacks and the poor. The black ghetto in the City of San Mateo is presently overpriced, overcrowded, and has a zero vacancy factor. The housing situation there, and elsewhere in the County, is critical. I want the removal of Article XXXIV because I care about providing decent, safe and sanitary housing for the poor, and I am against all discrimination in housing.

Dated: November 4, 1969.

/s/ Emily Marks Skolnick

Subscribed and sworn to before me this 4th day of November, 1969.

(Seal)

/s/ Betty Carroll,

Notary Public in and for the
County of San Mateo.

My commission expires May 13, 1973.

Exhibit K

[Title of Court and Cause]

**AFFIDAVIT IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT**

AFFIDAVIT OF MARILYN CRALLE WIEBENSON

State of California,
County of San Mateo—ss.

Marilyn Cralle Wiebenson, being duly sworn, deposes and says:

I am a citizen of the United States, and a resident of Santa Clara County. I am a member of the League of Women Voters, which in 1968-69 made an intensive study of the problems of housing. When the Urban Coalition requested a member of the League to join its Task Force on Fair Housing, I did so, and am presently a member.

Recently, the Fair Housing Task Force conducted two surveys involving housing discrimination, one in Santa Clara County, and the other, the one I personally conducted, in San Mateo County. My method of survey largely focused on speaking with community organizations and representatives, which included the Information Centers around the County, and the Economic Opportunity Commission. On the basis of my work, I am able to conclude that there is widespread discrimination in housing against blacks, particularly in rentals, and that there are areas like East Menlo Park and East Palo Alto which are made up largely of black families of low income.

I believe that these discriminatory attitudes against blacks in housing would be exercised if a referendum for low-income housing were held in San Mateo County, and the referendum would likely fail.

Dated: November 4, 1969.

/s/ Marilyn Cralle Wiebenson.

Subscribed and sworn to before me this 4th day of November, 1969.

(Seal)

/s/ Betty W. Carroll,

Notary Public in and for the
County of San Mateo.

My commission expires May 13, 1973.

I, Glenn Brown, Editor of the Advance Star, do hereby swear and certify that the attached is a true and correct copy of the newspaper article printed on Wednesday, November 5, 1969, reporting the public meeting of the San Mateo County Board of Supervisors held on the housing situation in San Mateo County.

Dated: November 17, 1969.

/s/ Glenn Brown

Subscribed and sworn to before me this 17th day of November, 1969.

(Seal)

/s/ Betty W. Carroll,

Notary Public in and for the
County of San Mateo.

My commission expires May 13, 1973.

(Newspaper Article omitted from appendix)

RESOLUTION No. 115 (1969)**Urging Revitalization of the San Mateo County Housing Authority and Consideration of Adjustments in the Income and Rental Ceiling Criteria**

Resolved, by the City Council of the City of San Mateo, California, that:

Whereas, many families resident of this City have insufficient income to pay for adequate housing;

Whereas, the Congress of the United States has enacted legislation, commonly known as the Rental Assistance Program, for the express purpose of making funds available with which to make up the difference between the cost of decent housing and what these citizens (and others in the same straits elsewhere in the United States) can afford;

Whereas, said program for rental assistance is administered nationally by setting income and rental ceilings as a function of family size and by allocating quotas to various local administrative agencies;

Whereas, said income and rental ceilings do not give due consideration to the great differences in housing and living costs and average income per capita between one part of the country and another.

Whereas, this City is in an area of the United States with one of the highest housing and living costs and average income, and the cost of most housing exceeds the established ceilings under said program;

Whereas, only 148 of the 418 qualified families in this City who have applied for rental assistance have been provided housing under said program and some

applicants, for whom housing has not been found, have been on a waiting list for as many as 18 months;

Whereas, many of the 148 families for whom housing has been found are in danger of losing their housing because of imminent rent increases which will place their costs above the established ceilings;

Whereas, it has been reported in the press that the San Mateo County Housing Authority is in a state of both financial and administrative collapse, and thus may not be in a position to protect the rights and interests of the citizens of this City who are qualified to receive assistance under said program; and

Whereas, even if rental cost ceilings were not a barrier, the family income criteria excludes many additional families whose income, though exceeding the nationally established standards, is still inadequate to permit them to obtain decent housing on the local market.

Now, Therefore, It Is Hereby Determined and Ordered, that:

1. The availability of adequate housing at a cost which can be met constitutes a grave threat to the well-being of many of the citizens of San Mateo.

2. The Board of Supervisors of the County of San Mateo be, and they are hereby, respectfully requested to take such steps as are necessary to revitalize the San Mateo County Housing Authority.

3. The Secretary of the Department of Housing and Urban Development be, and he is hereby, respectfully urged to make such adjustments in the

income and rental ceiling criteria as are necessary to reflect local housing, cost of living and income standards and that Senators Murphy and Cranston and Representative McCloskey be, and they are hereby, respectfully requested to use their best offices toward the implementation of these changes.

4. The City Clerk be, and he is hereby, ordered to cause a certified copy of this resolution to be forwarded to the Board of Supervisors of the County of San Mateo, the Honorable Secretary of the Department of Housing and Urban Development, Senators Murphy and Cranston and Representative McCloskey.

/s/ Hugh A. Wayne,
Mayor.

Attest: William J. O'Farrell,
City Clerk.

(Seal) By: /s/ Mary Rose,
Chief Deputy City Clerk.

(Certification omitted)

October 22, 1969

Hayes, et al. vs. Housing
Authority of San Mateo County
#C-69-1

Hon. Robert F. Peckham,
Judge of the U.S. District Court,
Federal Building,
Golden Gate Avenue,
San Francisco, California.

Dear Judge Peckham:

Supplementing my letter of October 6th addressed to you, to the attention of your Clerk, Mrs. Rosemary Miller, at your courtroom in San Jose, relative to the above-entitled matter, please be advised as follows: That at the regular meeting of the Housing Authority held October 21st, and at an earlier special meeting called for this purpose, the matter of the above action was discussed, and I, as attorney for the Housing Authority, have been directed by them not to appear formally in said action, and consequently no appearance by way of pleading will be made therein.

By virtue of the fact that this action has been consolidated with *Valtierra, et al., vs. Housing Authority of the City of San Jose, et al.*, C.A. #52076, which I understand involves the same issues, the question as to the constitutionality of Article XXXIV of the

Constitution of the State of California will undoubtedly be resolved.

Very truly yours,
Hugh F. Mullin, Jr.,
Attorney for the Housing Authority
of the County of San Mateo.

HFM: sgh

cc: C. C. Evensen, Clerk of
U.S. District Court
Legal Aid Society of
San Mateo County

Wm. Glenn Weman, Executive Director
Housing Authority, San Mateo County

Messrs. Ichinose, Albrecht, Bygdnes,
Rucker & Tassos, Commissioners.

CIVIL DOCKET

United States District Court
Three Judge Court:
Judges Hamlin, Peckham & Levin

S.J.

C-69-1

Attorneys
For plaintiff:
Legal Aid Society of S.M.C.
2221 Broadway
Redwood City, CA. 94063
Legal Aid Society of S.M.C.
1238 Willow Road
Menlo Park, CA. 94025

Gussie Hayes, et al.,

vs.

Housing Authority of San Mateo County,
et al.,

STATISTICAL RECORD

J.S. 5 mailed 10/1/69 (Date - 10-2-69) (Name or Receipt No. - 70706)

(Rec. - 15.00)

(Date - Oct 3 1969) (Name or Receipt No. - CD1-28)

(Disb. - 15.00)

J.S. 6 mailed

Basis of Action: Civ. R. Compl. Civil Rights Act. Seeks 10,000.00

Docket Entries—C-69-1-RFP—"B"
Gussie Hayes, et al. v.
Housing Auth. of San Mateo County, et al.
Proceedings

1969

Oct. 1—

1. Filed Complaint. Issued Summons: Three Judge Court Requested

Oct. 1—

2. Filed pltfs memo of pts & auths in support of complaint.

Oct. 1—

3. Filed affidavit of Lois P. Sheinfeld.

Oct. 1—

4. Filed ord for private process. (Clerk)

Oct. 1—

5. Filed pltfs notice of mo & mo to convene 3 Judge Court, 10-10-69.

Oct. 1—

6. Filed pltfs notice of mo & mo for consolidation, 10-10-69, 10:AM.

Oct. 1—

7. Filed summons on ret, exec 1 Oct. 69.

Oct. 10—

ORD aft hrg, pltfs mo to consolidate with 52076 granted; three judge court will convene to hear responsive pleadings 11-14-69 (Peckham)

Oct. 13—

8. Filed notification & cert. to Judge Chambers that action appears to be one requiring formation of 3 judge court. (Peckham)

Oct. 16—

9. Filed ORD convening THREE JUDGE COURT Consisting of Judge Oliver D. Hamlin, Judge Robert F. Peckham & Judge Gerald S. Levin. (Chambers)

Oct. 28—

10. Filed pltfs notice of mo & mo for default judgment, 11-14-69, 10 A.M.

Oct. 28—

11. Filed ORD that time for noticing pltfs mo for default judgment be shortened from 21 to 15 days. (Peckham)

Oct. 31—

12. Filed pltfs cert of svc of notice of mo & mo for default judgment etc.

Nov. 4—

13. Filed clerk's notice of cont. hrg of motions to 11-20-69, 10 AM, San Jose

Nov. 6—

14. Filed pltfs notice of mo & mo for sum. judgment, 11-14-69, 10 AM, San Jose

Nov. 6—

15. Filed pltfs affidavits in support of pltfs mo for sum. judgment.

Nov. 6—

16. Filed ORD that time for noticing pltfs mo for sum. judgmt be shortened to 7 days.
(Peckham)

Nov. 10—

17. Filed pltfs cert of svc of notice of mo & mo for sum. judgmt.

Nov. 12—

18. Filed Clerk's notice of THREE JUDGE HEARING on motions, 11-20-69, 10 AM, San Jose.

Nov. 17—

Received from Legal Aid Society, Resolution No. 115, as an attachment to Exh. "J"
(affidavit support. pltff's mo. for sum. judg.)
(Orig. & (sic)

Nov. 18—

Received from Legal Aid Society, copy of Newspaper article, as an attachment to Exh. "J" (affidavit support. pltff's. mo. for sum. judg.) (orig. & 3)

Nov. 18—

19. Filed pltfs cert of svc of an attachment to exhibit "J".

Nov. 20—

Ord. aft. 3 Judge hearing, mo. of deft. City of San Jose to dismiss, mo. of Deft. San Jose Housing Auth. to dismiss, Fed. defts. mo. to dismiss. & pltffs' appli. for prer. injunc. in action 42076 (in action C69-1 hrg. was for return on O.S.C. re prelim. injunc.) defts' coun-

sel to file fur. affidavits by Dec. 1, 1969; plttfs' counsel to file counter affidavits by Dec. 8, 1969; upon receipt of said affidavits the various mos. will be deemed submitted to the 3 judge court. (Hamlin, CJ, Peckham & Levin, (DJ's)

See Sheet B

1970

Mar. 23—

Filed memo of Decision & order; ord. that Federal defts mo for dismissal granted; plttfs. mo fro sum. judg. decaring article XXXIV to be unconstitutional & and their appli. for injunc. granted. (Hamlin, Peckham & Levin)

April 1—

Filed defts mo to amend decision dtd 3-23-70 & ORD shortening time for hrg on mo to 4-2-70, 2 PM. (IN 52076) (Peckham)

April 2—

THREE JUDGE HRG, ORD defts mo for stay of inj submitted & denied.
(Hamlin, Levin & Peckham)

April 2—

Filed ORD granting plttfs mo for sum. judgmt, declaratory judgmt & perm. inj. (IN 52076)
(Hamlin, Peckham & Levin)

April 10—

Filed joint Notice of Appeal to the Supreme Court of the United States in Civil 52076 & C-69-1-RFP filed in 52076

April 10—

Filed Designation of Record on Appeal in
52076

April 10—

Filed Defendant's amended designation of
contents of record on Appeal in 52076

April 13—

Filed Order to expedite appeal to the U.S.
Supreme Court it is Ordered that the Clerk of
the Court prepare & send the record of these
two consolidated cases up to the Supreme
Court within five (5) days in 52076
(Peckham)

April 20—

Made, Mailed Record on Appeal Supreme
Court of the U.S.

April 20—

Filed ORD of DISMISSAL of complaint as
to Federal debts w/prejudice. (Cys mailed)
(IN 52076) (Hamlin, Peckham & Levin)

May 6—

Filed Stipulation of Counsels that the Xerox
copies certified by the Clerk of the District
Court for the Northern District of California
as the Record on Appeal are true copies of
the originals in Civil 52076

May 7—

Re Made, Mailed Record on Appeal Supreme
Court of the United States

June 1—

Filed certificate of clerk to record on appeal
in 52076

Original Filed March 23, 1970,
Clerk, U.S. Dist. Court,
San Francisco

The United States District Court
Northern District of California

Anita Valtierra, et al.,

Plaintiffs,

vs.

The Housing Authority of the City of
San Jose, et al.,

Defendants.

No. 52,076

Gussie Hayes, et al.,

Plaintiffs,

vs.

Housing Authority of San Mateo,

Defendant.

No.

C-69-1-RFP

Before HAMLIN, Circuit Judge, and PECKHAM and
LEVIN, District Judges.

PECKHAM, District Judge:

This matter comes before this Court on plaintiffs' motions for summary judgment, their applications for an injunction, and defendants' motions to dismiss. Plaintiffs ask that we declare Article XXXIV of the California State Constitution¹ to be unconstitutional

¹ARTICLE XXXIV

PUBLIC HOUSING PROJECT LAW

§ 1. Approval of electors; definitions

Section 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state

and request that we forbid defendants from relying upon it as a reason for not requesting federal assistance with which to finance low-income housing. We hold Article XXXIV to be unconstitutional. *Hunter v. Erickson*, 393 U.S. 385 (1969).

Title 42 U.S.C. § 1983 creates a cause of action for the deprivation, under color of state law, of any right, privilege or immunity guaranteed by the United States Constitution. In this case, the non-federal defendants are acting under color of Article XXXIV in not requesting federal assistance. Equal protection cases brought to remedy discrimination against the poor (e.g., *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Shapiro v. Thompson*, 394 U.S. 618 (1969)),

public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

For the purposes of this article the term "low rent housing project" shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. For the purposes of this article only there shall be excluded from the term "low rent housing project" any such project where there shall be in existence on the effective date hereof, a contract for financial assistance between any state public body and the Federal Government in respect to such project.

For the purposes of this article only "persons of low income" shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

have long been entertained under § 1983. Jurisdiction to hear this case is conferred upon this Court by 28 U.S.C. § 1343(3), (4).

This case is required to be heard by a three-judge court by 28 U.S.C. §§ 2281, 2284, as plaintiffs seek an injunction enjoining defendant local officials from enforcing a state constitutional provision (see *A.F.L. v. Watson*, 327 U.S. 582 (1946)) on the ground of its repugnance to the Equal Protection Clause.

Two cases are consolidated for consideration. The first is *Valtierra v. Housing Authority of San Jose*, No. 52076. The parties plaintiff are "persons of low income," who have been determined to be eligible for public housing, and have been placed on the appropriate waiting lists. They are unable to occupy public housing because at present none is available. The second case, *Gussie Hayes, et al. v. Housing Authority of San Mateo*, No. C-69-1-RFP, is consolidated with the first because of the identity of the legal issue, and is brought by similarly situated poor persons, predominately Negro, on the waiting list for public housing in San Mateo County.

Plaintiffs have demonstrated that Article XXXIV has impeded the financing of new housing, only 52% of the referenda submitted to the voters have been approved, even though they cannot of course demonstrate that any particular named plaintiff would be able to occupy new housing if such housing were built. In Santa Clara County, the voters defeated the referendum seeking permission to obtain housing funds in 1968, and in San Mateo County two similar

referenda were defeated in 1966. Housing Director Wemen, in San Mateo County, feels it would be fruitless to attempt another referendum at present. [Affidavit J to *Hayes* complaint.] Plaintiffs' position is that but for the existence of Article XXXIV, local housing authorities would be able to apply for federal assistance if they chose; they further submit that there is evidence that in fact they would so choose. [See *Valtierra* complaint p.8].

There are three groups of defenders in the *Valtierra* case: the Housing Authority of the City of San Jose, a public entity, and its members in their official capacity; the City Council of San Jose, a public entity, and its members, in their official capacity; and the Department of Housing and Urban Development and its Secretary, George Romney. All three groups have filed responsive pleadings. There is only one defendant in the *Hayes* case, the Housing Authority of San Mateo County. The Court notes that this defendant has not made an appearance in the case, but rather has chosen to stand mute.

The federal defendants, the Department of Housing and Urban Development (HUD), and its Secretary, George Romney, move for dismissal on the ground that, as to them, the *Valtierra* complaint does not state a claim upon which relief can be granted. Fed.R.Civ.P. Rule 12(b)(6). The complaint does not seek any relief against the federal defendants; their joinder is not necessary in order to grant the relief that is requested. Therefore this Court ORDERS that their motion for dismissal be granted. Accord-

ingly, the federal defendants are dismissed from this lawsuit. The *Hayes* case does not involve any federal defendants.

The two non-federal defendants in the *Valtierra* case, viz, the Housing Authority of San Jose, and the City Council of San Jose, raise several pleas in abatement which do not preclude this Court from reaching the merits of plaintiffs' constitutional claim. First, defendants contend that because California could decline to participate in the program established by the Housing Act of 1937, that California can participate on any condition. This is not the case. Certainly a condition that no Negro could occupy such low-income housing would be unconstitutional. Second, they assert that referenda are not subject to constitutional scrutiny. This is not the law. *Hunter v. Erickson, supra*. Third, defendants erroneously believe plaintiffs are asking this Court to compel the Housing Authorities to seek federal funding. However, plaintiffs only seek an injunction forbidding the named local officers from relying on Article XXXIV as a reason for not requesting such funds. There may be any number of reasons, quite apart from Article XXXIV why the Housing Authorities might not wish to seek federal funds at any given point in time.

We find plaintiffs' Supremacy Clause argument to be unpersuasive and therefore do not decide the case on that ground. Plaintiffs' privileges and Immunities argument is not reached as this Court decides the case on Equal Protection grounds.

Plaintiffs' Equal Protection Argument

The starting point for this argument is the now well-established standard that classifications based on race are "constitutionally suspect," *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), and those based on property "traditionally disfavored," *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668 (1966). Both bear a far heavier burden of justification than other classifications. See, *McLaughlin v. Florida*, 379 U.S. 184, 194 (1964).

The gravamen of plaintiffs' Equal Protection claim is that the express discrimination in Article XXXIV, as it applies only to "low-income persons", brings it squarely within the ban of a long line of Supreme Court decisions forbidding the unequal imposition of burdens upon groups that are not rationally differentiable in the light of any legitimate State legislative objective. *E.g.*, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Carrington v. Rash*, 380 U.S. 89 (1965); *Baxtrom v. Herrold*, 383 U.S. 107 (1966); and *Rinaldi v. Yeager*, 384 U.S. 305 (1966). As characterized by the Court in *McLaughlin v. Florida*, 379 U.S. at 191:

Judicial inquiry under the Equal Protection Clause, . . . does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question . . . whether there is an arbitrary or invidious discrimination between those classes covered . . . and those excluded.

It is no longer a permissible legislative objective to contain or exclude persons simply because they are poor. *Edwards v. Calif.*, 314 U.S. 160 (1941); *Shapiro v. Thomson*, 394 U.S. 618 (1969); *Cf., Griffin v. Illinois*, 351 U.S. 12, 16-17 (1956).

In addition to asserting that Article XXXIV denies equal protection of the laws to persons who are poor, the *Hayes* plaintiffs assert that it also denies equal protection to those who are Negro. Although Article XXXIV does not specifically require a referendum for low-income projects which will be predominantly occupied by Negroes or other minority groups, the equal protections clause is violated if a "special burden" is placed on those groups by the operation of the challenged provision, if "the reality is that the law's impact falls on the minority." *Hunter v. Erickson*, *supra*, at 391.

Thus, last term, the Supreme Court in *Hunter v. Erickson*, *supra*, applied to the housing area the constitutional requirement for equal protection. In that case, the Supreme Court invalidated an amendment to the City Charter of Akron, Ohio, which required a referendum before anti-discrimination legislation could be enacted. The Court held this to be impermissible, stating that it violated the Equal Protection Clause for at least three reasons:

First, only laws designed to end housing discrimination were required to run the gauntlet of a referendum, and the state cannot make it more difficult to enact legislation on behalf of one group than on behalf of others. The *Hunter* court speaking through Mr. Justice White states, 393 U.S. at 390-91:

It is true that the section [requiring a referendum before action may be taken] draws no distinction among racial and religious groups. Negroes and whites, Jews and Catholics are all subject to the same requirements if there is housing discrimination against them which they wish to end. But § 137 [requiring the referendum] nevertheless disadvantages those who would benefit from laws barring racial . . . discrimination as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor. The automatic referendum system does not reach housing discrimination on sexual, or political grounds, or against those with children or dogs, nor does it affect tenants seeking more heat or better maintenance from landlords, nor those seeking rent control, urban renewal, public housing, or new building codes.

Second, the law's impact falls on minorities, resulting in an impermissible burden which constitutes a substantial and invidious denial of equal protection.

"Moreover, although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that. Like the law requiring specification of candidates' race on the ballot [citation omitted], § 137 places special burdens on racial minorities within the governmental process. This is no more permissible than denying them the vote, on an equal basis with others. [citations omitted] 393 U.S. at 391."

Lastly, the Court noted, 393 U.S. at 392:

... [I]nsisting that a State may distribute legislative power as it desires and that the people may retain for themselves the power over certain subjects may generally be true, but these principles furnish no justification for a legislative structure which otherwise would violate the Fourteenth Amendment. Nor does the implementation of this change through popular referendum immunize it. [Citations omitted.] The sovereignty of the people is itself subject to . . . constitutional limitations. . . .

Here, as in the *Hunter* case, the "special burden" of a referendum is not ordinarily required; here, as in the *Hunter* case, the impact of the law falls upon minorities.² The vice in this case is that Article XXXIV makes it more difficult for state agencies acting on behalf of the poor and the minorities to get federal assistance for housing than for state agencies acting on behalf of other groups to receive financial federal assistance. In California, state agencies may seek federal financial aid, without the

²That minority groups comprise "the poor" is increasingly clear. In his affidavit, Mr. Franklin Lockfield, Senior Planner for the Santa Clara County Planning Department stated: "The low-income areas are closely related to the areas of concentration of minority residents and high income areas are closely related to the nearly all white sections of the community. . . . In 1960, only 5% of the units occupied by white-non-Mexican-Americans were in delapidated or deteriorated condition, while 23% of the units occupied by Mexican-Americans and 20% of the units occupied by non-whites were in delapidated or deteriorated condition. Minorities were thus over represented in the less than standard housing by greater than four to one, and occupied nearly one-third of the deteriorating and delapidated housing in the County in 1960."

burden of first submitting the proposal to a referendum, for all projects except low-income housing. Some common examples, *inter alia*, are: highways, urban renewal, hospitals, colleges and universities, secondary schools, law enforcement assistance, and model cities. Further, even though federal assistance for state housing agencies is a privilege which California need not seek at all, the requirements of equal protection must still be met. *U.S. v. Chicago, M., St.P. & P. RR.*, 282 U.S. 311, 328-29 (1931); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Shapiro v. Thomson, supra*.

Defendants argue that Article XXXIV does not violate the Equal Protection Clause because it was not the product of unconstitutional motivations. However, although proof of bad motive may help to prove discrimination, lack of bad motive has never been held to cure an otherwise discriminatory scheme. Certainly *Hunter* does not demand a demonstration of improper motivation.

Accordingly, plaintiffs' motions for summary judgment, declaring Article XXXIV to be unconstitutional, and their applications for an injunction are granted.

It Is So Ordered.

Oliver D. Hamlin,
United States Circuit Judge
Robert F. Peckham,
United States District Judge
Gerald S. Levin
United States District Judge

Filed Apr 2 1970,
C. C. Evensen, Clerk

(Title of Court and Cause)

**ORDER GRANTING PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT; DECLARA-
TORY JUDGMENT AND PERMANENT IN-
JUNCTION**

The above entitled matters having heretofore been consolidated for all purposes and the motions of plaintiffs for summary judgment having been presented and the Court being full advised, and having considered the pleadings, motions and affidavits, and after hearing oral arguments, and the Court having determined that there is no genuine issue of material fact,

The Court finds that the plaintiffs in both causes are entitled to summary judgment as a matter of law.

Therefore it is Ordered, Adjudged and Decreed that:

A. The motions of Plaintiffs for summary judgment in their favor are granted;

B. Article XXXIV of the California Constitution is declared unconstitutional and shall have no further force and effect for the reasons set forth in this Court's opinion filed March 23, 1970;

C. The defendants, The Housing Authority of San Mateo County, a public entity; William G. Weiman, individually and as Executive Director of the Housing Authority of San Mateo County; Benjamin Ichinose; Ben Albrecht; Perry A. Bygdnes; Raymond

Rucker and James A. Tassos, individually and in their official capacities as Commissioners of the Housing Authority of San Mateo, their successors in office, agents, servants, employees and attorneys and all other persons in active concert or participation with them be and hereby are permanently restrained and enjoined from abiding by or relying upon Article XXXIV as a reason for not requesting state or federal assistance with which to finance low income housing;

The defendants, The Housing Authority of the City of San Jose, a public entity; Rodmar H. Pulley, Mary R. Boyce, Walter Rector, David Reiser, Allen Belandi and Sam Obregon, in their official capacities; the City Council of the City of San Jose, Ronald James, Virginia C. Shaffer, Joseph Colla, Walter V. Hays, David J. Goglio, Kurt Gross, in their official capacities; their successors in office, agents, servants, employees and attorneys and all other persons in active concert or participation with them, be and hereby are permanently restrained and enjoined from abiding by or relying upon Article XXXIV as a reason for not requesting state or federal assistance with which to finance low income housing.

Dated: April 2, 1970.

/s/ Oliver D. Hamlin,
United States Circuit Judge,
/s/ Robert F. Peckham,
United States District Judge,
/s/ Gerald S. Levin,
United States District Judge.

FILE COPY

FILED

MAY 21 1959

In the Supreme Court

of the
United States

October Term, 1958

No. ~~4888~~ 154

RONALD JAMES, et al., Appellants,

vs.

ANITA VALTIERRA, et al., Appellees.

GORDON HAYES, et al.,

vs.

HOMING AUTHORITY OF SAN MATEO.

On Appeal From the United States District Court
Northern District of California

JURISDICTIONAL STATEMENT

DONALD G. ATKINSON,

425 City Hall

San Jose, California 95101,

Attorney for Appellants.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No.

RONALD JAMES, et al., *Appellants*,

VS.

ANITA VALTIERRA, et al., *Appellees*.

GUSSIE HAYES, et al.,

VS.

HOUSING AUTHORITY OF SAN MATEO.

On Appeal From the United States District Court
Northern District of California

JURISDICTIONAL STATEMENT

THE OPINION BELOW

The Memorandum Decision of the United States District Court for the Northern District of California appears herein as Appendix A. No other written opinions have been delivered.

**STATEMENT OF THE GROUNDS ON WHICH THE
JURISDICTION OF THIS COURT IS INVOKED**

(i) Declaratory and injunctive relief was sought from a three-judge panel of the federal district court below pursuant to Title 28 of the United States Code, Section 2281, for the purpose of challenging the constitutionality of Article 34 of the California Constitution and to attempt to require or enable appellants to proceed to acquire federal financing for public housing without reference to the requirements of Article 34. Plaintiff-Appellees brought a class action on behalf of the poor against Defendant-Appellants in their representative capacity, as members of the City Council of the City of San Jose, California. The City itself was not made a party to the action and neither was the State of California. Article 34 requires that any public housing entity in the State which proposes to acquire public housing for persons of low income shall first submit such proposal to its voters for majority approval at a referendum election. Appellees contended that Article 34 was repugnant to the Privileges and Immunities, the Equal Protection and the Supremacy Clauses of the United States Constitution. They also sought jurisdiction of the Court below under Sections 1331 and 1343 of Title 28 and under Section 1983 of Title 42 of the United States Code. A separate and similar action was filed about one month later than the San Jose suit against San Mateo County defendants. No appearance was made by any of the defendants of that action. The chief difference between that suit and the San Jose suit was that the San Mateo suit alleged discrimination on racial grounds as well as economic grounds.

The cases were then consolidated by the District Court for all purposes. The decision of the District Court was that Article 34 violated the Equal Protection Clause of the 14th Amendment of the United States Constitution.

(ii) The judgment sought to be reviewed is the summary judgment granted to Appellees holding Article 34 of the California Constitution to be unconstitutional and enjoining appellants from relying on its provisions as a reason for not requesting state or federal assistance with which to finance low income housing. That judgment was entered on April 2, 1970. No motion for new trial was made. The Notice of Appeal was filed in the United States District Court for the Northern District of California, the Court possessed of the record, on April 10, 1970.

(iii) Jurisdiction of the appeal is conferred on this Court by Title 28 of the United States Code, Section 1253.

(iv) Cases sustaining the jurisdiction of this Court are:

Radio Corp. of America v. U.S. (D.C. Ill. 1950) 95 F.Supp. 660, affirmed 71 S.Ct. 806, 341 U.S. 412, 95 L.Ed. 1062;

Florida Lime & Avocado Growers, Inc. v. Jacobsen (Cal. 1960) 80 S.Ct. 568, 362 U.S. 73, 4 L.Ed.2d 568;

St. Louis & O'Fallon Ry. Co. v. U.S. (Mo. 1929) 49 S.Ct. 384, 279 U.S. 461, 73 L.Ed. 798;

Baker v. Carr (Tenn. 1962) 82 S.Ct. 691, 369 U.S. 186, 7 L.Ed.2d 663.

(v) The validity of Section 1 of Article 34 of the California Constitution is here involved. The full text of that article is as follows:

"§ 1. Approval of electors; definitions

Section 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

"For the purposes of this article the term 'low rent housing project' shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. For the purposes of this article only there shall be excluded from the term 'low rent housing project' any such project where there shall be in existence on the effective date hereof, a contract for financial assistance between any state public body and the Federal Government in respect to such project.

"For the purposes of this article only 'persons of low income' shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing

project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

"For the purposes of this article the term 'state public body' shall mean this State, or any city, city and county, county, district, authority, agency, or any other subdivision or public body of this State.

"For the purposes of this article the term 'Federal Government' shall mean the United States of America, or any agency or instrumentality, corporate or otherwise, of the United States of America. (Added Nov. 7, 1950.)

"§ 2. Self-executing provisions

Sec. 2. The provisions of this article shall be self-executing but legislation not in conflict herewith may be enacted to facilitate its operation. (Added Nov. 7, 1950.)

"§ 3. Partial validity

Sec. 3. If any portion, section or clause of this article, or the application thereof to any person or circumstance, shall for any reason be declared unconstitutional or held invalid, the remainder of this article, or the application of such portion, section or clause to other persons or circumstances, shall not be affected thereby. (Added Nov. 7, 1950.)

"§ 4. Conflicting provisions superseded

Sec. 4. The provisions of this article shall supersede all provisions of this Constitution and laws enacted thereunder in conflict therewith. (Added Nov. 7, 1950.)"

QUESTIONS PRESENTED BY THE APPEAL

The following questions are presented by this appeal:

(i) Does a state constitutional provision which limits the authority of a public body of such state to develop, construct or acquire low rent housing project for persons of low income without such entity first having obtained the approval of a majority of the qualified electors of the city, town or county, in which it is proposed to develop, construct, or acquire the same, voting on such issue at an election for that purpose, or at any general or special election, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution where the undisputed facts are that, with certain exceptions involving federally-owned housing, housing for public employees and housing for students at state universities and colleges, no other type of publicly-owned housing exists in such state?

(ii) Does a majority of the people of a State have the right to restrict the power of the local public bodies of such state to provide low rent housing to persons of low income of that state, where persons of low income form a "minority" of that state, but where there are in fact no public, middle or high rent projects in existence?

STATEMENT OF THE FACTS OF THE CASE

On November 7, 1950, the voters of the State of California at a general election approved an initiative measure, designated as Proposition 10, which added

Article 34 to the California Constitution. Earlier that same year, the California Supreme Court had ruled that referendums were not applicable to decisions to build public housing on the grounds that such decisions were mere administrative acts as opposed to legislative acts.¹ Whether or not this decision prompted the initiative effort is not known to the Appellants. Nevertheless, the effect of the Constitutional Amendment was to nullify the decision for future situations where a state public body seeks to acquire public housing. It limited the authority of any State public body to develop, construct or acquire low rent housing without the prior approval of a majority of the qualified electors of the city, town or county in whose jurisdiction the proposed project is to be located, who vote on the issue.

By Resolution No. 28614, dated January 17, 1966, and adopted pursuant to the provisions of Section 34242 of the California Health and Safety Code, the Council of the City of San Jose found a need for low rent housing in its community. This resolution established the Housing Authority of the City of San Jose. Of the seven members then on the Council voting on the resolution, only two were members at the time this suit was filed in the District Court below, namely, Ronald James and Virginia C. Shaffer. Mayor James, then a Councilman, voted in favor of Resolution 28614, whereas Mrs. Shaffer voted against it. It was adopted by a vote of six to one.

¹*Housing Authority v. Supreme Court* (June 1950) 35 Cal. 2d 550, 219 Pac.2d 457.

Almost three years later, or on November 5, 1968, a special municipal election was held in San Jose as consolidated with the State of California general election. Measure B on the ballot was as follows:

"Shall the Housing Authority of the City of San Jose have authority to develop, construct, and acquire, in any manner selected by said Authority, a low rent housing project (as defined in Article XXXIV of the California Constitution), consisting of not more than one thousand dwelling units, subject to the following conditions: (1) not more than four such dwelling units shall be situate in any one structure, (2) not more than one structure containing any such dwelling unit shall be situate on any one lot, and (3) such dwelling units shall be dispersed among various sections of the City so that not more than twenty-four such dwelling units shall be situate within a radius of fifteen hundred feet from any other such dwelling unit."

The measure was defeated by a vote of 68,527 "against" to 57,896 "for" its approval.

It was the combination of the failure of this measure together with the requirements of Article 34 and the allegedly increased need for low rent housing units in San Jose which prompted the filing of the action below. Plaintiffs attempt to eliminate what they regard as an unfair obstacle in their path to obtain publicly-owned, low rent housing units for themselves and others of their class. The adult plaintiffs are mothers of the several respective minor plaintiffs. All are welfare recipients, residents of this City, and all live in over-crowded facilities. At least some of the

facilities are also sub-standard from the standpoint of health and safety factors.

An uncontroverted affidavit submitted by plaintiffs in support of their Motion for Summary Judgment showed that whereas in November, 1969 the City and the County Housing Authorities leased a total of 1,933 units for sublease at low rent, nevertheless, there was then an immediate need for 1,853 additional units. Whereas, none of the Appellants has admitted in Court that there is a current need for low rent housing units in the City of San Jose, nevertheless none of them has offered any evidence to refute the claim. And for purposes of this Appeal at least, current need is an established fact.

In opposition, however, to the Motion for Summary Judgment below, appellants prepared a stipulation of fact, entered into by the attorneys for the Appellees which sets forth the types of publicly-owned or leased housing in the State of California. This stipulation established as uncontroverted fact that except for federally-owned housing, housing for certain State employees, housing for college and university students, and housing acquired to clear the way for public projects such as highways, airports, streets, etc., no other type of housing is owned or leased by any state public body of the State of California for residential purposes other than housing for rental to persons of low income, as such persons are defined by Article 34. In other words, with the above exceptions, there is no State, City or County owned or leased housing for rental to persons of middle or high incomes in California.

Also established as uncontroverted fact by plaintiffs' own affidavits, and as already noted above, Appellants, or rather the Housing Authority established by them, have acquired by lease existing housing units in the City of San Jose, for subleasing to persons of low income in this City. Such acquisition by the Housing Authority has never been submitted to the electors of this City for their approval. The reason for this is that the Attorney General of the State of California has rendered an opinion that such type of acquisition does not fall within the requirements of Article 34. (47 Ops. Cal. Atty. Gen. 17, issued January 18, 1966 as Opinion No. 65-246.)

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

This appeal squarely raises the question of the right of a majority of the people of the State of California to limit the authority of its various state public bodies in such manner as does Article 34 in view of the existing facts relative to public housing of this State and the existing laws of the United States.

(1) THE DECISION BELOW ADOPTS AN INTERPRETATION OR APPLICATION OF THE EQUAL PROTECTION CLAUSE WHICH HAS NEVER BEEN USED BEFORE.

The test of equal protection has always been to determine if the challenged law adds burdens to one class or grants benefits to another to the exclusion of other persons in similar situations without adequate

or substantial justification for the different treatment.² The "whites" can't be favored over the "blacks", or the "browns", or the "yellows". The "rich" can't be favored over the "poor". Males can't be favored over females. In each of the cases dealing in these areas the "sides" or the "classes" were always discernible. In this decision, however, it is difficult to see who the Court felt was being treated unfairly. It is also difficult to see what class is treated differently. The Fourteenth Amendment does impose a requirement of some rationality in the nature of the class singled out.³ But the Court's application stretches the test beyond logical limits for the purpose of striking down Article 34. The opinion states the "vice" to be that "Article XXXIV makes it more difficult for *state agencies* acting on behalf of the poor and the minorities to get federal assistance for housing than for *state agencies* acting on behalf of other groups to receive financial federal assistance." Is the Court now taking the position that the Fourteenth Amendment is to be extended to protect state agen-

²*Douglas v. California*, 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814, reh. den. 373 U.S. 905, 10 L.Ed.2d 200, 83 S.Ct. 1288;

Truax v. Corrigan, 257 U.S. 312, 66 L.Ed. 254, 42 S.Ct. 124, 27 A.L.R. 375;

Mountain Timber Co. v. Washington, 243 U.S. 219, 61 L.Ed. 685, 37 S.Ct. 260;

Atchison, T. & S.F.R. Co. v. Matthews, 174 U.S. 96, 43 L.Ed. 909, 19 S.Ct. 609;

Marchant v. Pennsylvania R. Co., 153 U.S. 380, 38 L.Ed. 751, 14 S.Ct. 894;

McPherson v. Blacker, 146 U.S. 1, 36 L.Ed. 869, 13 S.Ct. 3; *State Sav. & Commercial Bank v. Anderson*, 165 Cal. 437, 132 P. 755, affd. 238 U.S. 611, 59 L.Ed. 1488, 35 S.Ct. 792.

³*Rinaldi v. Yeager*, 384 U.S. 305, 16 L.Ed.2d 577, 86 S.Ct. 1497.

cies? Of course not.⁴ But if not, and if it is merely the poor the Court was concerned about, who composes or makes up the "other groups" referred to? The Court refers to "common examples" as groups who benefit from federal financing for "highways, urban renewal, hospitals, colleges and universities, secondary schools, law enforcement assistance, and model cities". Is this classification suggested by the Court rational? Appellants maintain it is not. To follow through on the logic of the Court's rationale, is not the Court holding that the Fourteenth Amendment says that if the poor are able to benefit from model city programs without need for a referendum, they should also be allowed to benefit from low rent housing programs in the same way? To put it another way, the Court seems to suggest that referendums, to be fair, must apply to *all* decisions regarding the seeking of federal financing, or to *none* at all. It is Appellants' position that, while not a literal statement of the Court's reasoning, it is nevertheless an accurate paraphrase. Such reasoning is not an attack which relies, however, on the accepted principle that the rich and the middle class cannot be given public benefits from which the poor are excluded. What the Court is saying is that, given a certain "open door" policy at the local level with respect to seeking one form of federal financial assistance, such policy should apply across the board to the seeking of all other forms of federal financial assistance

⁴*Williams v. Baltimore*, 289 U.S. 36, 77 L.Ed. 1015, 53 S.Ct. 431;

Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N.E. 158, 96 A.L.R. 271.

alike. It is an attempt to attain equality in "enjoyment" rather than equality of "right". But such is clearly not the law under the Fourteenth Amendment, and it never has been.⁵ If such were to become the law, however, legislative discretion to set conditions as a prerequisite to seeking federal financial assistance may well become a thing of the past.

The greater part of all legislation is discriminatory in the extent to which it operates, the manner in which it applies, or the objects sought to be attained by it.⁶ Article 34 is no different. But there are legitimate reasons for having, or not having, publicly owned low rent housing units in some communities while not in others. No one, neither the Court below nor Plaintiffs, have asserted otherwise. In fact, a list of these legitimate local concerns presented to the Court below in briefs were not disputed, and the Court even acknowledged the existence of such reasons in its opinion. The important fact in California which the Court below failed to consider, however, is, that, because in California there exists only low rent public housing, and no other type (except for certain minor exceptions), Article 34 treats *all* public housing alike.

⁵*Coppage v. Kansas*, 236 U.S. 1, 59 L.Ed. 441, 35 S.Ct. 240; *Chicago v. Rhine*, 363 Ill. 619, 2 N.E.2d 905.

⁶*Hill v. Rae*, 52 Mont. 378, 158 Pac. 826.

- (ii) UNTIL THE DECISION BELOW, IT HAS ALWAYS BEEN A BASIC RULE OF DEMOCRATIC GOVERNMENT THAT AS LONG AS LEGISLATIVE BODIES DO HAVE DISCRETIONARY POWERS, AND TO THE EXTENT THAT THEY SO DO, THIS DISCRETION CAN BE LIMITED OR SHARED BY THE MORE SUPREME POWER, THE POWER OF THE PEOPLE THEMSELVES ACTING WITHIN, AND IN CONCERT WITH, THEIR CONSTITUTIONAL RIGHTS.

What Appellants urge is that, as long as legislative bodies do have discretionary powers,⁷ and to the extent that they so do, this discretion can be limited or shared by the more supreme power, the power of the people themselves acting within, and in concert with, their Constitutional rights.⁸

Appellants do not make the argument that the "majority" of voters can discriminate against the "minority" of voters. But to the extent that legislative action, discretion and decisions can constitutionally be made at the local level by the local legislative body, and to the extent that a republican form of government involves the concept of majority rule, that action, discretion and decision can be shared by the voters of that local public entity.

⁷*Morey v. Doud*, 354 U.S. 457, 1 L.Ed.2d 1485, 77 S.Ct. 1344;

Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 96 L.Ed. 469, 72 S.Ct.405, reh. den. 343 U.S. 921, 96 L.Ed. 1334, 72 S.Ct. 674;

Sproles v. Binford, 286 U.S. 374, 76 L.Ed. 1167, 52 S.Ct. 581;

Rainey v. Michel, 6 Cal.2d 259, 57 P.2d 932, 105 A.L.R. 148.

⁸*Cochran v. Louisiana State Bd. of Education*, 281 U.S. 370, 74 L.Ed. 913, 50 S.Ct. 335;

Maynard v. Board of Canvassers, 84 Mich. 228, 47 N.W. 756;

Art. IV, § 4 and Tenth Amendment to U.S. Constitution;
Ware v. Hylton, 3 Dallas (U.S.) 199, 1 L.Ed. 568.

The case of *Hunter v. Erickson*, 393 U.S. 385, 21 L.Ed.2d 616, 89 S.Ct. 557, relied upon the Court's opinion below, albeit, a case involving a referendum requirement limiting the authority of a local government, is, nevertheless, distinguishable, and should be distinguished, on its facts. The decision below is an overly broad application of the principles enunciated by the Supreme Court in *Hunter*, and is not justified by the decision in that case.

The judgment and decision below squarely puts into jeopardy the right or the power of the people to decide, *before* the fact, whether or not to extend a given benefit, such as low rent housing, to a class of people such as the poor. As long as there is no *duty* to extend such benefit; as long as the enjoyment of such benefit is a mere privilege; as long as the same benefit has not been conferred on others; and as long as a given legislative body would have the power to make such a decision, then the voters who elected the members of that legislative body should have the power to restrict such decision making power in such a way as to share it with those elected members.

(iii) THE DECISION BELOW HAS PLACED A CLOUD UPON THE ABILITY OF HOUSING AUTHORITIES IN THE STATE OF CALIFORNIA TO PROCEED TO DEVELOP, CONSTRUCT, OR ACQUIRE LOW RENT HOUSING WITHOUT FIRST COMPLYING WITH THE PROVISIONS OF ARTICLE 34.

At this time neither HUD officials nor law firms who specialize as bond counsel can assure Appellants, or housing authorities of this state that Article 34 can be ignored until such time as the matter has been finally decided by the United States Supreme Court. HUD officials have informally told Appellants that they are not sure if an application made to them for funds by a California Housing Authority without compliance with Article 34 would be favorably accepted until the Supreme Court rules on the matter. Competent bond counsel have advised Appellants that, until such time as the constitutionality of Article 34 has been ruled upon by the Supreme Court, they could not render an opinion to prospective purchaser-investors as to the validity of revenue bonds sold for the construction or acquisition of such housing units in California. Furthermore, Appellants are informed by the United States Attorney's Office that similar legislation exists in the States of Minnesota, Nebraska, South Dakota, Texas, Vermont and Virginia. Therefore, Appellants submit, the federal questions involved are of urgent and substantial social concern.

CONCLUSION

The appeal raises issues of fundamental importance to our system of democratic government. The extent to which voters can participate in important, legislative decisions of social concern is being challenged and must be more clearly defined. The Court is asked at this time to preserve to the majority its right of self-determination and suffrage while at the same time the Court protects the right of the minority against discrimination.

Respectfully submitted,
DONALD C. ATKINSON,
Attorney for Appellants.

April, 1970

(Appendix A Follows)

Appendix A

The United States District Court Northern District of California

Anita Valtierra, et al.,

Plaintiffs,

vs.

The Housing Authority of the City of
San Jose, et al.,

Defendants.

No. 52076

Gussie Hayes, et al.,

Plaintiffs,

vs.

Housing Authority of San Mateo,

Defendant.

No.
C-69-1-RFP

Before **HAMLIN**, Circuit Judge, and **PECKHAM** and
LEVIN, District Judges.

PECKHAM, District Judge:

This matter comes before this Court on plaintiffs' motions for summary judgment, their applications for an injunction, and defendants' motions to dismiss. Plaintiffs ask that we declare Article XXXIV of the California State Constitution¹ to be unconstitutional

1

ARTICLE XXXIV

PUBLIC HOUSING PROJECT LAW

§ 1. Approval of electors; definitions

Section 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, con-

and request that we forbid defendants from relying upon it as a reason for not requesting federal assistance with which to finance low-income housing. We hold Article XXXIV to be unconstitutional. *Hunter v. Erickson*, 393 U.S. 385 (1969).

Title 42 U.S.C. § 1983 creates a cause of action for the deprivation, under color of state law, of any right, privilege or immunity guaranteed by the United States Constitution. In this case, the non-federal defendants are acting under color of Article XXXIV in not requesting federal assistance. Equal protection cases brought to remedy discrimination against the poor (e.g., *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Shapiro v. Thompson*, 394 U.S. 618 (1969)), have long been entertained under § 1983. Jurisdiction to hear this case is conferred upon this Court by 28 U.S.C. § 1343(3), (4).

struct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

For the purposes of this article the term "low rent housing project" shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. For the purposes of this article only there shall be excluded from the term "low rent housing project" any such project where there shall be in existence on the effective date hereof, a contract for financial assistance between any state public body and the Federal Government in respect to such project.

For the purposes of this article only "persons of low income" shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

This case is required to be heard by a three-judge court by 28 U.S.C. §§ 2281, 2284, as plaintiffs seek an injunction enjoining defendant local officials from enforcing a state constitutional provision (see *A.F.L. v. Watson*, 327 U.S. 582 (1946)) on the ground of its repugnance to the Equal Protection Clause.

Two cases are consolidated for consideration. The first is *Valtierra v. Housing Authority of San Jose*, No. 52076. The parties plaintiff are "persons of low income," who have been determined to be eligible for public housing, and have been placed on the appropriate waiting lists. They are unable to occupy public housing because at present none is available. The second case, *Gussie Hayes, et al. v. Housing Authority of San Mateo*, No. C-69-1-RFP, is consolidated with the first because of the identity of the legal issue, and is brought by similarly situated poor persons, predominately Negro, on the waiting list for public housing in San Mateo County.

Plaintiffs have demonstrated that Article XXXIV has impeded the financing of new housing, only 52% of the referenda submitted to the voters have been approved, even though they cannot of course demonstrate that any particular named plaintiff would be able to occupy new housing if such housing were built. In Santa Clara County, the voters defeated the referendum seeking permission to obtain housing funds in 1968, and in San Mateo County two similar referenda were defeated in 1966. Housing Director Wemen, in San Mateo County, feels it would be fruitless to attempt another referendum at present. [Affi-

davit J to *Hayes* complaint.] Plaintiffs' position is that but for the existence of Article XXXIV, local housing authorities would be able to apply for federal assistance if they chose; they further submit that there is evidence that in fact they would so choose. [See *Valtierra* complaint p. 8).

There are three groups of defendants in the *Valtierra* case: the Housing Authority of the City of San Jose, a public entity, and its members in their official capacity; the City Council of San Jose, a public entity, and its members, in their official capacity; and the Department of Housing and Urban Development and its Secretary, George Romney. All three groups have filed responsive pleadings. There is only one defendant in the *Hayes* case, the Housing Authority of San Mateo County. The Court notes that this defendant has not made an appearance in the case, but rather has chosen to stand mute.

The federal defendants, the Department of Housing and Urban Development (HUD), and its Secretary, George Romney, move for dismissal on the ground that, as to them, the *Valtierra* complaint does not state a claim upon which relief can be granted. Fed. R.Civ.P. Rule 12(b)(6). The complaint does not seek any relief against the federal defendants; their joinder is not necessary in order to grant the relief that is requested. Therefore this Court ORDERS that their motion for dismissal be granted. Accordingly, the federal defendants are dismissed from this lawsuit. The *Hayes* case does not involve any federal defendants.

The two non-federal defendants in the *Valtierra* case, viz., the Housing Authority of San Jose, and the City Council of San Jose, raise several pleas in abatement which do not preclude this Court from reaching the merits of plaintiffs' constitutional claim. First, defendants contend that because California could decline to participate in the program established by the Housing Act of 1937, that California can participate on any condition. This is not the case. Certainly a condition that no Negro could occupy such low-income housing would be unconstitutional. Second, they assert that referenda are not subject to constitutional scrutiny. This is not the law. *Hunter v. Erickson, supra*. Third, defendants erroneously believe plaintiffs are asking this Court to compel the Housing Authorities to seek federal funding. However, plaintiffs only seek an injunction forbidding the named local officers from relying on Article XXXIV as a reason for not requesting such funds. There may be any number of reasons, quite apart from Article XXXIV why the Housing Authorities might not wish to seek federal funds at any given point in time.

We find plaintiffs' Supremacy Clause argument to be unpersuasive and therefore do not decide the case on that ground. Plaintiffs' privileges and Immunities argument is not reached as this Court decides the case on Equal Protection grounds.

PLAINTIFFS' EQUAL PROTECTION ARGUMENT

The starting point for this argument is the now well-established standard that classifications based on

race are "constitutionally suspect," *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), and those based on property "traditionally disfavored," *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668 (1966). Both bear a far heavier burden of justification than other classifications. See, *McLaughlin v. Florida*, 379 U.S. 184, 194 (1964).

The gravamen of plaintiffs' Equal Protection claim is that the express discrimination in Article XXXIV, as it applies only to "low-income persons", brings it squarely within the ban of a long line of Supreme Court decisions forbidding the unequal imposition of burdens upon groups that are not rationally differentiable in the light of any legitimate State legislative objective. *E.g.*, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Carrington v. Rash*, 380 U.S. 89 (1965); *Baxtrom v. Herrold*, 383 U.S. 107 (1966); and *Rinaldi v. Yeager*, 384 U.S. 305 (1966). As characterized by the Court in *McLaughlin v. Florida*, 379 U.S. at 191:

Judicial inquiry under the Equal Protection Clause, . . . does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question . . . whether there is an arbitrary or invidious discrimination between those classes covered . . . and those excluded.

It is no longer a permissible legislative objective to contain or exclude persons simply because they are poor. *Edwards v. Calif.*, 314 U.S. 160 (1941); *Shapiro v. Thomson*, 394 U.S. 618 (1969). *Cf.*, *Griffin v. Illinois*, 351 U.S. 12, 16-17 (1956).

In addition to asserting that Article XXXIV denies equal protection of the laws to persons who are poor, the *Hayes* plaintiffs assert that it also denies equal protection to those who are Negro. Although Article XXXIV does not specifically require a referendum for low-income projects which will be predominantly occupied by Negroes or other minority groups, the equal protections clause is violated if a "special burden" is placed on those groups by the operation of the challenged provision, if "the reality is that the law's impact falls on the minority." *Hunter v. Erickson, supra*, at 391.

Thus, last term, the Supreme Court in *Hunter v. Erickson, supra*, applied to the housing area the constitutional requirement for equal protection. In that case, the Supreme Court invalidated an amendment to the City Charter of Akron, Ohio, which required a referendum before anti-discrimination legislation could be enacted. The Court held this to be impermissible, stating that it violated the Equal Protection Clause for at least three reasons:

First, only laws designed to end housing discrimination were required to run the gauntlet of a referendum, and the state cannot make it more difficult to enact legislation on behalf of one group than on behalf of others. The *Hunter* Court speaking through Mr. Justice White states, 393 U.S. at 390-91:

It is true that the section [requiring a referendum before action may be taken] draws no distinction among racial and religious groups. Negroes and whites, Jews and Catholics are all subject to the same requirements if there is housing

discrimination against them which they wish to end. But § 137 [requiring the referendum] nevertheless disadvantages those who would benefit from laws barring racial . . . discrimination as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor. The automatic referendum system does not reach housing discrimination on sexual, or political grounds, or against those with children or dogs, nor does it affect tenants seeking more heat or better maintenance from landlords, nor those seeking rent control, urban renewal, public housing, or new building codes.

Second, the law's impact falls on minorities, resulting in an impermissible burden which constitutes a substantial and invidious denial of equal protection.

"Moreover, although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that. Like the law requiring specification of candidates' race on the ballot [citation omitted], § 137 places special burdens on racial minorities within the governmental process. This is no more permissible than denying them the vote, on an equal basis with others. [citations omitted] 393 U.S. at 391."

Lastly, the Court noted, 393 U.S. at 392:

. . . [I]nsisting that a State may distribute legislative power as it desires and that the people may retain for themselves the power over certain

subjects may generally be true, but these principles furnish no justification for a legislative structure which otherwise would violate the Fourteenth Amendment. Nor does the implementation of this change through popular referendum immunize it. [Citations omitted.] The sovereignty of the people is itself subject to . . . constitutional limitations. . . .

Here, as in the *Hunter* case, the "special burden" of a referendum is not ordinarily required; here, as in the *Hunter* case, the impact of the law falls upon minorities.² The vice in this case is that Article XXXIV makes it more difficult for state agencies acting on behalf of the poor and the minorities to get federal assistance for housing than for state agencies acting on behalf of other groups to receive financial federal assistance. In California, state agencies may seek federal financial aid, without the burden of first submitting the proposal to a referendum, for all projects except low-income housing. Some common examples, *inter alia*, are: highways, urban renewal, hospitals, colleges and universities, secondary schools, law enforcement assistance, and model cities. Further,

²That minority groups comprise "the poor" is increasingly clear. In his affidavit, Mr. Franklin Lockfeld, Senior Planner for the Santa Clara County Planning Department stated: "The low-income areas are closely related to the areas of concentration of minority residents and high income areas are closely related to the nearly all white sections of the community. . . . In 1960, only 5% of the units occupied by white-non-Mexican-Americans were in dilapidated or deteriorated condition, while 23% of the units occupied by Mexican-Americans and 20% of the units occupied by non-whites were in dilapidated or deteriorated condition. Minorities were thus over represented in the less than standard housing by greater than four to one, and occupied nearly one-third of the deteriorating and dilapidated housing in the County in 1960."

even though federal assistance for state housing agencies is a privilege which California need not seek at all, the requirements of equal protection must still be met. *U.S. v. Chicago, M., St.P. & P. RR.*, 282 U.S. 311, 328-29 (1931); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Shapiro v. Thomson*, *supra*.

Defendants argue that Article XXXIV does not violate the Equal Protection Clause because it was not the product of unconstitutional motivations. However, although proof of bad motive may help to prove discrimination, lack of bad motive has never been held to cure an otherwise discriminatory scheme. Certainly *Hunter* does not demand a demonstration of improper motivation.

Accordingly, plaintiff's motions for summary judgment, declaring Article XXXIV to be unconstitutional, and their applications for an injunction are granted.

It Is So Ordered.

Oliver D. Hamlin,
United States Circuit Judge,
Robert F. Peckham,
United States District Judge,
Gerald S. Levin,
United States District Judge.

Filed March 23, 1970,
Clerk, United States District Court,
San Francisco.

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In the Supreme Court of the
United States

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JUN 5 1970

JOHN F. DAVIS, CLERK

In the Supreme Court of the
United States

OCTOBER TERM, 1969

No.

~~100~~ 226

VIRGINIA C. SHAFFER,

Appellant,

VS.

ANITA VALTIERRA, et al.

On Appeal from the United States District Court
for the Northern District of California

Jurisdictional Statement
On Behalf of Appellant Virginia C. Shaffer

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June, 1970

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1557

RONALD JAMES, et al.,

VS.

ANITA VALTIERRA, et al.

Appellants, }

On Appeal from the United States District Court
for the Northern District of California

Jurisdictional Statement and Brief in Opposition to Motion to Affirm On Behalf of Appellant Virginia C. Shaffer

Appellant Virginia C. Shaffer appeals from the judgment¹ of the United States District Court for the Northern District of California, entered on April 2, 1970 in the case of *Valtierra v. Housing Authority of the City of San Jose, et al.*, No. 52076, enjoining

1. The judgment is attached as Appendix 2. The record has been filed by the appellants other than appellant Shaffer, and the Clerk's office has informed us that a duplicate record accompanying this Jurisdictional Statement is not desired. We have been unable to obtain an index to the record as filed. Hence record references herein are to the title of the document as filed below, except for those documents reproduced in the appendices hereto, as to which we cite the appendix pages.

All emphasis in quotations has been added, unless otherwise noted.

enforcement of Article XXXIV of the Constitution of the State of California, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

Appellant Shaffer is a member of the City Council of the City of San Jose, California. As such she is one of the defendants and an appellant. She comes before this Court by counsel separate from the other appellants² because, in her belief, the other appellants do not desire the judgment below to be reversed; they seek to utilize the appeal to obtain this Court's affirmance of a decision which would outlaw a provision of the Constitution of California from whose constraints they, as members of the City Council of San Jose, would prefer to be free. The present case is one of two raising the same issue, consolidated below for hearing. In the other, *Hayes v. Housing Authority of San Mateo*, No. C-69-1 RFP, N.D. Cal., defendants did not even put up a token case; they defaulted. Here the defendant Housing Authority of San Jose and those defendants who are members or officers of the Housing Authority have not even appealed. Appellants are members of the City Council of San Jose. Other than appellant Shaffer, they actually wish an affirmance from this Court so that the City of San Jose can float bonds free of doubts created by ignoring the Constitution of California.³ To this end the appeal was filed just 8 days after the judgment was entered, a jurisdictional statement was hastily filed by the other appellants within another two weeks, and the plaintiff-appellees have already filed a Motion To Affirm.

This appellant therefore unites in the present document both her Jurisdictional Statement and her Brief in Opposition to the Motion to Affirm.

2. Brought in after the notice of appeal was filed.

3. See their Jurisdictional Statement, at p. 16. By this statement we do not mean to impugn the office of the City Attorney of San Jose, which represents the other appellants. They are constrained to present the case within the limitations of their clients' desires.

OPINION BELOW

The Opinion of the District Court is not yet reported. It is attached as Appendix 1, *infra*.

JURISDICTION

This is a suit to enjoin the enforcement of a provision of the Constitution of California,—in the words of the complaint, "to invalidate Article 34 of the California Constitution" (Compl. ¶ 1). The jurisdiction of the court below was invoked under 28 U.S.C. §§ 1331 and 1343, 42 U.S.C. § 1983, and the Equal Protection clause of the 14th Amendment⁴ (Compl. ¶ 2). A three-judge court was convened under 28 U.S.C. §§ 2281, 2284. Its judgment, granting plaintiffs' motion for summary judgment, declaratory judgment, and *permanent injunction* (App. 2, p. 11a) was entered April 2, 1970. The Notice of Appeal⁵ was filed April 10, 1970, in the District Court. This Court has jurisdiction under 28 U.S.C. § 1253, the appeal being from a permanent injunction by a three-judge court against enforcement of or obedience to a provision of a State Constitution. *Dandridge v. Williams*, No. 131, Oct. Term 1969, 38 U.S.L. Week 4277 (April 6, 1970); *Florida Lime & Avocado Growers v. Jacobsen*, 362 U.S. 73 (1960); *A.F. of L. v. Watson*, 327 U.S. 582 (1946).

STATE CONSTITUTIONAL PROVISION INVOLVED

Article XXXIV of the Constitution of California (Cal. Stats. 1951 cxxiv):

"SECTION 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of

4. Jurisdiction was also invoked under the Privileges and Immunities and Supremacy Clauses. The court below found the "Supremacy argument unpersuasive" and did not reach the Privileges and Immunity Argument, as it "decides the case on Equal Protection grounds" (App. 1, p. 4a).

5. A copy of the Notice of Appeal is attached as Appendix 3.

the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

"For the purpose of this article the term 'low rent housing project' shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. For the purposes of this article only there shall be excluded from the term 'low rent housing project' any such project where there shall be in existence on the effective date hereof, a contract for financial assistance between any state public body and the Federal Government in respect to such project.

"For the purposes of this article only 'persons of low income' shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

"For the purposes of this article the term 'state public body' shall mean this State, or any city, city and county, county, district, authority, agency, or any other subdivision or public body of this State.

"For the purposes of this article the term 'Federal Government' shall mean the United States of America, or any agency or instrumentality, corporate or otherwise, of the United States of America.

"SEC. 2. The provisions of this article shall be self-executing but legislation not in conflict herewith may be enacted to facilitate its operation.

"SEC. 3. If any portion, section or clause of this article, or the application thereof to any person or circumstance, shall for any reason be declared unconstitutional or held invalid,

the remainder of this article, or the application of such portion, section or clause to other persons or circumstances, shall not be affected thereby.

"SEC. 4. The provisions of this article shall supersede all provisions of this Constitution and laws enacted thereunder in conflict therewith."

STATUTES INVOLVED

28 U.S.C. § 1253:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

28 U.S.C. § 1343:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

28 U.S.C. § 2281:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

QUESTION PRESENTED

Where a State provides no manner of public housing except low rent housing for persons of low income, does the State Constitution violate the equal protection clause of the 14th Amendment, merely because it provides that no low-rent housing project shall be developed, constructed or acquired by any state public body unless the project has been approved by a majority of the voters in the locality of the project?

STATEMENT OF THE CASE

1. The genesis of Article XXXIV of the California Constitution

"The United States Housing Act of 1937 (42 U.S.C.A. §§ 1401-1430)⁽⁶⁾ established a federal housing agency authorized to make loans to state agencies for the purpose of slum clearance and low-rent housing projects. The California Legislature made the benefits of the federal act available to the cities and counties of this state by enacting the Housing Authorities Law * * *.

"The legislation created in each city and county a public housing authority * * *. The exercise of the powers entrusted by the Legislature to these agencies was made subject to the preliminary condition that the local governing body, in each case, must formally resolve that public housing is needed."

On November 7, 1950, the People of the State of California at a general election added Article XXXIV to the State Constitution, providing that no low-rent housing project shall proceed without prior approval by the voters of the locality. What occasioned its adoption was the discovery of a gap in California in the referendum system. The initiative and referendum are integral parts of the distribution of sovereignty in California. Article IV, Sec. 1, of the California Constitution, on the Legislative Department, vesting legislative power, added

6. Act of Sept. 1, 1937, c. 896, 50 Stat. 888, as amended.

7. The foregoing is quoted from *Housing Authority v. Superior Court*, 35 Cal. 2d 550, 552-53, 219 P.2d 457, 458 (1950).

"but the people reserve to themselves the power to propose laws or amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature, and also reserve the power, at their own option, to so adopt or reject any Act, or section or part of any Act, passed by the Legislature."

The same section also provides that

"The initiative and referendum powers of the people are hereby further reserved to the electors of each county, city and county, city and town of the State to be exercised under such procedure as may be provided by law."^{7a}

In June 1950 the Supreme Court of California held that the acts of a local governing body and housing authority under the Housing Authorities Act of California relative to applications to the federal housing authority were "executive and administrative," not "legislative", and therefore not reached by the power of referendum. *Housing Authority v. Superior Court*, 35 Cal. 2d 550, 219 P.2d 457 (1950). It was in *immediate* response to this decision that Article XXXIV was adopted by the electorate less than 6 months later. To the mind of the electorate Article XXXIV was not new but a reaffirmance of a policy going back for years.

2. The propriety and reasonableness of the requirement of a vote by the electorate was immediately recognized by Congress

The propriety and reasonableness of a requirement that there be no low rent public housing unless first approved by the electorate so appealed to the Congress of the United States that it almost immediately made it nationwide by the Independent Offices Appropriations Act the next year. The Act of August 31, 1951, c. 376, Title I, 65 Stat. 277 provided:

"*Provided further*, That the Public Housing Administration shall not, after the date of approval of this Act, authorize

7a. The language of the foregoing provisions was simplified in 1966 but without change of substance.

the construction of any projects initiated before or after March 1, 1949, in any locality in which such projects have been or may hereafter be rejected by the governing body of the locality or *by public vote*, unless such projects have been subsequently approved by the same procedure through which such rejection was expressed."

The next year Congress repeated the prohibition, in exactly the same language, in the Act of July 5, 1952, c. 578, Title I, 66 Stat. 403. The following year Congress reasserted the policy in the First Independent Offices Appropriation Act of 1954 (Act of July 31, 1953, c. 302, Title I, 67 Stat. 306), thus:

"Provided further, That unless the governing body of the locality agrees to its completion, no housing shall be authorized by the Public Housing Administration, or, if under construction continue to be constructed, in any community where the people of that community, by their duly elected representatives, or by referendum, have indicated they do not want it, and such community shall negotiate with the Federal Government for the completion of such housing, or its abandonment, in whole or in part, and shall agree to repay to the Government the moneys expended prior to the vote or other formal action whereby the community rejected such housing project for any such projects not to be completed plus such amount as may be required to pay all costs and liquidate all obligations lawfully incurred by the local housing authority prior to such rejection in connection with any project not to be completed."

3. The basis on which Article XXXIV was submitted to the People of California and adopted by them

The California Constitution (former Art. IV, § 1, ¶ 11) required the Secretary of State before any election to prepare an official pamphlet and distribute it to every voter, containing arguments for and against every proposition to be voted upon. Attached hereto as Appendix 4 is a copy of the portion of the 1950 Ballot pamphlet on Proposition 10, which became Article XXXIV of the State Constitution.

The Argument in Favor of Initiative Proposition No. 10 contained this:

"A 'YES' vote for this proposed constitutional amendment is a vote neither for nor against public housing. It is a vote for the future right to say 'yes' or 'no' when the community considers a public housing project.

"Passage of the 'Public Housing Projects Law' will restore to the citizens of a city, town, or county, as the case may be, the right to decide whether public housing is needed or wanted in each particular locality. Such is not the case at present.

"Time after time within the past year California communities have had public housing projects forced upon them without regard either to the wishes of the citizens or community needs. This is a particularly critical matter in view of the fact that the long-term, multimillion-dollar public housing contracts call for tax waivers and other forms of local assistance, which the Federal Government says will amount to HALF the cost of the federal subsidy on the project as long as it exists.

"For government to force such additional hidden expense on the voters at a time when taxation and the cost of living have reached an extreme high is a 'gift' of debatable value. It should be accepted or rejected by ballot.

"If, on the other hand, certain communities are in such dire need of housing that the cost of long-term subsidization is deemed worth while, local voters, who best know that need, should have the right to express their wishes by ballot.

"In either case, a 'YES' vote for this proposed amendment will strengthen local self-government and restore to the community the right to determine its own future course.

"Furthermore, the financing of public housing projects is an adaptation of the principle of the issuance of revenue bonds. Under California law, revenue bonds, which bind a community to many years of debt, cannot be issued without local approval given by ballot. Public housing and its long years of hidden debt should also be submitted to the voters to give them the right to decide whether the need for public housing is worth the cost."

4. The proposed Housing Project in the City of San Jose and its rejection by the electorate

In 1966 the San Jose City Council resolved that there was a shortage of safe and sanitary dwellings in the city available to persons of low income and that there was need for a housing authority⁸. It then appointed the commissioners for the Housing Authority as provided by California law (Compl., Ex. F).

In 1968, in obedience to Article XXXIV of the State Constitution, the Housing Authority proposed to the voters of San Jose a low-rent housing project to consist of not more than 1,000 units. The measure failed of passage at the election of November 5, 1968 by 57,896 votes to 68,527 (Compl., Ex. G, Pltfs. Request for Admn. ¶ 12)⁹.

5. This suit: the complaint

This suit was commenced on August 27, 1969. According to the complaint, plaintiffs are three mothers and their minor children, living in crowded or substandard housing (Compl. ¶¶ 5-8). The Jurisdictional Statement of the other appellants asserts (at p. 2) that this "is a class action on behalf of the poor." That is not correct. The complaint alleged that plaintiffs sued on behalf of a class consisting of "all persons who are citizens of the United States and who are on the waiting list of the Housing Authority of the City of San Jose." (Compl. ¶ 9). But F.R.Civ.P. Rule 23(a) provides that an action may not be maintained as a class action until a determination is made by the court that it may be so maintained. No such determination was ever sought or made. The action, therefore, is not a class action.

Named as defendants are the Housing Authority of San Jose, its Executive Director and Commissioners, the City Council of

8. Pltfs. Request for Admn. attaching Resolution No. 28614, admitted by defendants.

9. Taxpayers' revolt in California has been statewide; few proposals for bonded indebtedness have surmounted the general concern over mounting taxes.

San Jose and its members, including appellant Virginia C. Shaffer (Request for Adm. ¶¶ 15, 18).¹⁰ After mingled statements of law, fact, and conclusion under the captions "The Public Housing Program in California" and "Public Housing in San Jose", the complaint contained three counts for declaratory relief and injunction. The first claimed a denial of equal protection of the laws, and it is the only count on which the court below based its judgment (See fn. 4, p. 3; *supra*). The prayer is for a declaration that Article XXXIV is void, for a mandatory injunction enjoining defendants "from refusing to proceed with the necessary steps leading to the construction of the 1,000 public housing units proposed by the Housing Authority of the City of San Jose in 1968 . . ." and for an injunction against ". . . enforcing, following[,] abiding by or relying on any of the provisions of Article 34 of the California Constitution."

Welcoming the suit as a means of being released from the obligation of their official oath to the State Constitution, the defendant members of the Housing Authority freely admitted allegations of the complaint. The answer filed by the City Attorney for the defendant City councilmen, including appellant Shaffer, denied material allegations of the complaint.

6. The record in the case

The record consists of the pleadings, affidavits attached to the complaint, responses to a request by plaintiffs for admission, certain additional affidavits, and a Stipulation of Fact. *There was no trial*. On that record plaintiffs moved for summary judgment. The record consists of the following alone:

- (a) Identification of the plaintiffs, the kind of housing in which they live, the rent they pay, their income, and what

10. The complaint also purports to name as defendants the United States Department of Housing and Urban Development and Secretary Romney. They were dismissed on motion (App. 1, pp. 3a, 4a).

they receive from public welfare authorities (Compl. Ex. A, B, C).

(b) An admission that the Housing Authority of San Jose "will not make application to HUD for a preliminary loan," and the City Council will not approve such an application or any construction contract for public housing, "until the proposal has been approved by the electorate in accordance with Article 34" (Pltfs. Request for Admn. ¶¶ 16, 19, 20).

(c) Affidavits of an employee of the Planning Department of Santa Clara County (in which San Jose is located) that there is a shortage of low-cost housing in that county, and that rents are increasing, with the opinion that lack of adequate housing correlates with low income and minority status (Lockfield Aff.), and an affidavit of an employee of the San Jose City Planning Department that in his opinion low income is the factor most highly correlated with substandard housing (Wells Affdvt.)

(d) A *Stipulation of Fact* that housing for rental to persons of low income (as defined by Article XXXIV of the California Constitution) is the only kind of public housing in California, except for housing for state officials and state university personnel and housing incidentally acquired and temporarily held in connection with eminent domain proceedings. A copy of the stipulation is attached as Appendix 5.

7. The motion for summary judgment and the decision below

Upon this bare and sparse record,¹¹ plaintiffs moved for summary judgment and the District Court granted the motion. It declared that "Article XXXIV of the California Constitution

11. The District Court consolidated this case with the *Hayes* case arising from San Mateo County; and it disposed of the two together. No defense was made in the *Hayes* case.

is * * * unconstitutional and shall have no further force and effect" under the Equal Protection Clause of the 14th Amendment, and it enjoined the defendants "from abiding by or relying upon Article XXXIV as a reason for not requesting state or federal assistance with which to finance low income housing." (App. 2).

Obviously, the District Court declared Article XXXIV to be unconstitutional on its face, as an abstract textual conclusion reached by laying Article XXXIV alongside the 14th Amendment, for no other facts in the record were relevant to its conclusion. The facts identifying plaintiffs bear only on standing to sue. The affidavits of the employees of the Santa Clara and San Jose planning departments state no more than that there is a need for low-cost housing.

The District Court placed its chief reliance on *Hunter v. Erickson*, 393 U.S. 385 (1969). Deciding the case solely on Equal Protection grounds, it said: "The gravamen of plaintiffs' Equal Protection claim is that the *express discrimination in Article XXXIV*, as it applies only to 'low-income persons', brings it squarely within the ban of a long line of Supreme Court decisions forbidding the unequal imposition of burdens upon groups that are not rationally differentiable in the light of any legitimate State legislative objective." (App. 1, p. 5a)

Noting that the plaintiffs in the *Hayes* case—although not those in the instant case—asserted that Article XXXIV also denies equal protection to Negroes, the court reviewed *Hunter v. Erickson* at length and concluded (App. 1, p. 7a)

"Here, as in the *Hunter* case, the 'special burden' of a referendum is not ordinarily required; here, as in the *Hunter* case, the impact of the law falls upon minorities."

The District Court added (App. 1, p. 7a):

"The vice in this case is that Article XXXIV makes it more difficult for state agencies acting on behalf of the poor and

the minorities to get federal assistance for housing than for state agencies acting on behalf of other groups to receive financial federal assistance. In California, state agencies may seek federal financial aid, without the burden of first submitting the proposal to a referendum, for all projects except low-income housing. Some common examples, *inter alia*, are: highways, urban renewal, hospitals, colleges and universities, secondary schools, law enforcement assistance, and model cities."

DISCUSSION: THE QUESTION IS SUBSTANTIAL

This Court plainly has jurisdiction, for a three-judge court has declared a portion of a State Constitution in conflict with the federal Constitution, has declared that it "shall have no further force and effect," has enjoined State officials from relying upon it and has ordered them to act contrary to it. By virtue of these very facts, the question is a substantial one. The procedure of a three judge Court with direct appeal to this Court is summed up in *Phillips v. United States*, 312 U.S. 246, 251 (1941), "The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy." And where that policy is expressed in a state constitutional provision of many years' standing, it would be an extraordinary case that could deny substantiality of the issue.

Moreover, we submit that the judgment is plainly wrong. We respectfully submit that the court below has embraced the very usage of the 14th Amendment, outmoded in the 1930's, to strike down state policies incompatible with its own outlook, albeit from a different direction. And, as shown at p. 30, *infra*, its decision conflicts with the principles recently applied by the Fourth Circuit in *Spaulding v. Blair*, 403 F.2d 862, and by the Sixth Circuit in *Ranjel v. City of Lansing*, 417 F.2d 321, cert. denied 38 U.S.L. Week 3364.

A. Article XXXIV of the California Constitution Has No Invidious Purpose, Legitimate Reasons Motivated Its Adoption, and Legitimate Reasons Motivate Voter Treatment of Housing Projects

This case is unlike *Hunter v. Erickson*, 393 U.S. 385 (1969). There the City of Akron had a housing ordinance, enacted by its City Council, prohibiting discrimination on the basis of "race, color, religion, ancestry, or national origin", and the ordinance set up machinery to enforce its anti-discrimination provisions. The city charter was then altered by initiative for the express purpose of creating a racial classification. The charter amendment provided that any ordinance regulating use, sale, lease or other handling of real property "on the basis of race, color, religion, national origin or ancestry" required the approval of the electors before it could take effect. The charter not only repealed a fair housing ordinance aimed at racial discrimination, but it set up a classification based on race. In the words used by this Court to distinguish the situation, "there was an explicitly racial classification treating racial housing matters differently from other racial and housing matters" (p. 389).

Nor is this case like *Reitman v. Mulkey*, 387 U.S. 369 (1967),¹² in which the initiative provision also went farther than mere repeal of state anti-racial discrimination legislation. This Court there relied upon a construction by the Supreme Court of the State, binding on this Court, that the intent of the initiative amendment was to create a constitutional right to discrimination on racial grounds (387 U.S. at 376).

Those cases and this are poles apart. Article XXXIV repeals nothing, it is not expressed in terms of race or discrimination, it had no unconstitutional motive, and it has no unconstitutional effect. It is neutral. Its sole purpose and effect are to reserve to the people in a community the right to determine whether a proposed housing project (a) is desirable and (b) justifies the financial burden. We briefly review (a) the motive or purpose, and (b) the effect.

12. Not cited by the court below, but cited in *Hunter v. Erickson*.

1. MOTIVE OR PURPOSE OF ARTICLE XXXIV OF THE CALIFORNIA CONSTITUTION

As we have seen (pp. 8, 9, *supra*), the reasons presented to the voters in favor of adoption of Article XXXIV in 1950 had nothing to do with race or poverty. They were exclusively (a) political and (b) fiscal.

First as to the fiscal: Almost from its beginning public policy in California has insisted that major public indebtedness may not be incurred without approval by the voters: it has insisted that fiscal control be in the voters' hands. Thus the State Constitution provides that no city, county or school district shall incur an indebtedness or liability in any manner exceeding the income of that government for one year except with the consent of two-thirds of the voters at an election. (Art. XI, Sec. 18). This restriction was added at the Constitutional Convention of 1879 because of a groundswell of public demand produced by excessive municipal indebtedness and numerous defaulted bond issues.¹³ As these controls have from time to time over the years been eluded because the words of the 1879 constitution did not fit new or ingenious devices, the public has enacted measures to preserve or regain its controls. In *Housing Authority v. Dockweiler*, 14 Cal.2d 437, 94 P.2d 794 (1939), it was held that a housing authority, although a public corporation, was not a "city or county" and therefore could incur indebtedness not subject to Article XI, Sec. 18.

It was in good part to rectify this erosion with respect to low rent public housing projects that Article XXXIV was sponsored and adopted. Appellees' Motion to Affirm asserts (at p. 5) that "No local funds are used; the cost of the program is borne completely by the federal government and by the tenants of the housing units." This is either naive or uncandid; in any event, it is erroneous. Low rent housing projects are constructed through 40-year bonds issued

13. See, for example, Van Alstyne, Arvo, "Background Study Relating to Article XI: Local Government," Calif. Constitution Revision Commission.

by the local housing authority. Although the federal government contracts to make annual contributions sufficient to pay interest and principal, the local governing body must contract to provide all municipal services for the 40 years and to waive all taxes, receiving in lieu 10% of the rentals, and the rentals are, of course, purposefully and artificially low. In consequence, the financial burden on the locality comes to 60% of what the normal tax receipts from the property would be, even on values calculated at the low rental basis. The well-known and esteemed Commonwealth Club of California, in its analysis of proposed Article XXXIV, concluded and stated in 1950 that "It is expected that value of the contributions which localities make by foregoing full ad valorem taxes on the projects occupied by low-income families, less in lieu payments which are received, will approximate 50% of the federal contribution over the life of the project."¹⁴ Inasmuch as property tax rates have risen drastically since 1950 in march with the higher costs of providing municipal services, the burden upon the local community is now considerably greater. Literature from federal agencies and public housing agencies today refrains from making any estimate of local sharing.

In addition to the fiscal, there are many reasons, having nothing to do with race or poverty, why local voters might disapprove a particular housing project presented to them. No person knowledgeable in housing and sociology will say, in A.D. 1970, after years of experience, that public housing is *necessarily* desirable or good for minority groups or for those of low income. The issues are far more subtle. Spokesmen for the poor and for minority groups increasingly reject public housing. Whether rightly or wrongly we do not say; that is a matter on which courts may take no position. But the reasons for rejection are legitimate questions to be put directly to the voters of a community.

14. *The Commonwealth*, Commonwealth Club of California, October 9, 1950.

Just recently the Kerner Commission (National Advisory Commission on Civil Disorders) said in its report (Bantam ed. 1968, at p. 478), that federal policies have dictated that most housing projects "be of *institutional design and mammoth size*". Yet many sound thinkers object to "institutional design" and to "mammoth size" as psychologically debilitating and sociologically oppressive. Voters may object to them on esthetic grounds or upon the ground that such projects tend to perpetuate rather than overcome racial segregation, or upon the ground that large concentrations of low-income housing creates a major change in the environment, a creation of a "central city" divorced from its surroundings. The Kerner report (p. 474) observes:

"Federal housing programs must be given a new thrust aimed at overcoming the prevailing patterns of racial segregation. If this is not done, those programs will continue to concentrate the most impoverished and dependent segments of the population into the central-city ghettos where there is already a critical gap between the needs of the population and the public resources to deal with them. This can only continue to compound the conditions of failure and hopelessness which lead to crime, civil disorder and social disorganization."

The United States Department of Housing and Urban Development has said:¹⁵

"Between 1937 and 1965, [Local Housing Authorities] provided low-rent housing primarily by new construction. By the 1960's, however, it was clear that new construction alone could not meet the tremendous need for decent housing at low rents *Clear too was the fact that housing developments in which all the occupants are at or near the poverty level do not make the most satisfactory environment for all low-income people.*"

"To meet changing conditions, new methods were needed."

In short, public housing can have major sociological effects. Voters are entitled to a direct voice in decisions which alter the

15. HUD, Housing For Low Income Families, p. 5 (1967).

characteristics of their very environment for generations. Votes for or against a particular project find explanation in a multitude of reasons.

Appellees' motion to affirm (at p. 6) posits statistics that with "8% of the nation's poor, California has only 4% of the low income housing units" and has constructed fewer "low income units per 1000 low income family groups" than other states like New York. The source of these statistics is not given; they are not in the record. And they are meretricious. Is it being insinuated that the poor of California are not as well housed as the poor elsewhere? Is it being suggested that "low income" housing under the Housing Act of 1937 is the only housing for the poor? This kind of argument illustrates the vice of a summary judgment. If questions like these are relevant at all to the issue in the case, there should be a plenary trial in which a complete and factual basis for a constitutional determination can be made.

There are enough facts of which judicial notice is available to indicate that the insinuations are unsound, both as to housing for the poor elsewhere than California and the availability of other kinds of housing for the poor in California. Thus, despite the greater number of units of low income housing per 1000 constructed in New York, primarily in New York City, housing there is in crucial shortage because numerous units have become wholly uninhabitable.¹⁶

Moreover, other federal housing programs, conceived much later than the Housing Act of 1937, offer significant alternatives

16. A statement of Jason R. Nathan, Administrator, Housing and Development Administration, before New York State Housing Committee, November 7, 1969, states that despite New York City's "record breaking publicly-assisted construction" (p. 4) "crisis" or "disaster" is imminent in New York (p. 1) because of "the amount of housing draining out from the bottom of the reservoir", twice as many units being abandoned as constructed (p. 4). Barron's National Business and Financial Weekly, March 16, 1970, states that nearly 100,000 rental units in New York City have become uninhabitable within the last three years. Mr. Nathan states that 500,000 units are on the way out (p. 5).

to the massive institutional housing project. One of them is the leased housing-rent subsidy plan.¹⁷ As stated by the Department of Housing and Community Development of the State of California, the "leasing program provides the machinery by which existing vacant dwellings within a community may be leased by its local housing authority at prevailing rents and then subleased to a low income senior citizen or families at rents within their financial reach."¹⁸ California has a higher proportion of subsidized leased housing than any other state. It has taken the lead in this new form of low income housing thought by many to be more enlightened. "[A]bout one-third of the total leased units for the nation are in California. * * * The impact of the leasing program has been significant in California."¹⁹ For example, the San Jose Housing Authority has nearly 2,000 leased units (Lockfield Affidavit). Under the leased housing-rent subsidy plan the Housing Authorities lease, for terms up to five years, existing housing in the community—ideally and generally geographically distributed through the community—from private owners and then sub-lease it to families of low-income, providing a subsidy in the rental based on the income of the tenant. About 23,000 of such units were authorized in California (since the inception of the program in late 1965).²⁰

Another alternative to the institutional housing project is the rent supplement program.²¹ Under that program (12 U.S.C. § 1701s), housing is privately built, owned and managed by non-profit, limited dividend or cooperative organizations with

17. HUD, Housing Assistance Administration, *Housing for Low-Income Families* (1967); HUD, FHA, *The Leasing Program for Low-Income Families* (1967).

18. Annual Report, 1969, Department of Housing and Community Development of the State of California, p. 22.

19. *Ibid.*, p. 23.

20. *Ibid.*, p. 22.

21. HUD, *The Rent Supplement Program for Low-Income Families* (1968)

FHA mortgage financing at market interest rates. Rent supplements are furnished directly by contract between FHA and owner-developer for those tenants who qualify under income standards in the federal law.²²

Although these alternatives are also administered by local authorities, the Attorney General of California has given his opinion that they do not require voter approval under Article XXXIV of the California Constitution;²³ leased units and privately-owned houses whose tenants receive rent supplements are not developed, constructed, or acquired by the Housing Authority.

Under Section 236 of the National Housing Act, 12 U.S.C. § 1715 z-1, in 1968 a still newer program of direct interest subsidies to lenders on privately constructed homes is authorized for those families of qualifying low-income, to keep monthly payments for housing, including taxes and insurance, to 25% of income.

We note these various methods of meeting the need for low-cost housing, not to suggest that one is better than another, but to say that voters may legitimately think so, wholly divorced from racial prejudices, and it is reasonable to let them be heard at the polls. Voters may well believe, on grounds unrelated to race or poverty, that other programs are more eligible from the standpoint of public and community interest than a mammoth, unitary project, and therefore exercise their right under Article XXXIV to disapprove such a project. And there is not a scrap of evidence in the record to suggest that reasons of race and

22. President Johnson has said of these programs:

"The most crucial new instrument in our effort to improve the American city is the rent supplement . . . a program of rent supplements for low-income families . . . provides a brand new approach to meet an ancient and long-neglected need."

HUD, "The Rent Supplement Program for Low Income Families".

23. 47 Ops.Cal.Atty.Gen. 17 (1966).

poverty have entered into the adoption of Article XXXIV or the action taken by the electorate under it.

In sum, Article XXXIV is a wholly neutral provision which bears no resemblance in purpose or effect to the measures struck down in *Reitman v. Mulkey* and *Hunter v. Erickson*.

2. HOW ARTICLE XXXIV OF THE CALIFORNIA CONSTITUTION HAS IN FACT OPERATED

The voters have exercised their power in favor of—not against—the project on over $\frac{2}{3}$ of the occasions presented to them, almost as high a percentage of success as school bond issues have enjoyed in California.²⁴ The opinion below states (App. 1, p. 3a) that only 52% of low-income housing units submitted to the voters throughout California in the first 18 years during which Article XXXIV has been in effect have been approved by the voters. This conclusion was drawn from a document entitled "Public Housing Referenda Thru June 14, 1968" and footnoted "Source: California Department of Housing and Community Development, August 8, 1968."²⁵ What the document actually shows is that, while 52% of the housing units proposed were approved by the voters, there were 127 referenda and 69% of the elections resulted in votes favorable to the project.²⁶ Communities in which an initial referendum has been lost have voted for a project on resubmission. Communities that have

24. A California Assembly Interim Committee on Revenue and Taxation, in a report "Taxation of Property in California", Dec. 1969, commented that "California voters have approved 75 percent of the bond issues brought to a vote since 1954-1955, a high tribute to the traditional regard in which Californians have had education". The taxpayers' revolt has greatly reduced that figure since then.

25. This document was appended to plaintiffs' "Memorandum of Points and Authorities in Support of Complaint for Declaratory and Injunctive Relief," which was filed with the complaint. We question whether it is properly part of the record, but we agree that it is accurate.

26. The disparity between the number of successful elections and the number of approved units is in part at least due to the rejection of a monstrous proposal in Los Angeles for 10,000 units.

approved projects have rejected later projects. There is no definite pattern when the elections are analyzed by years.

B. The Equal Protection Clause Does Not Preclude Reasonable Classification. Article XXXIV Makes No Classification Either on the Basis of Race or Poverty

Classifications based on race are "constitutionally suspect," *Hunter v. Erickson*, 393 U.S. 385, 392 (1969) and cases there cited. There is no such classification here. Apart from racial classification, a state created category is not in violation of the 14th Amendment if any set of facts can be rationally conceived to support it. E.g., *McDonald v. Board of Election*, 394 U.S. 802, 808-09 (1969); *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961). One who complains of a violation of the Equal Protection Clause must show that someone *comparably situated* has been treated differently. *National Union v. Arnold*, 348 U.S. 37, 41 (1954).

Appellees' Motion to Affirm would place poverty in the same category as race as a suspect classification under the Equal Protection Clause. At this point it is in order to replace words by thought. While laws may not deprive the poor of basic rights of citizens, such as the right to move from state to state,²⁷ or the right to vote,²⁸ it is a fact of life that indigency is a social, economic and political situation to which government must give its attention, or at least rightfully may do so. And to do so is not to discriminate unconstitutionally. In turning its attention to this subject, a State has wide freedom to determine what it should do and how it should do it. In permitting classification, the Equal Protection Clause allows the lawmaker to single out the need to be served or the "evil" to be eradicated and to legislate about *that* need

27. *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Edwards v. California*, 314 U.S. 160 (1941).

28. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) the poll tax case.

or "evil" without requiring like treatment of other matters outside the area. As Mr. Justice Holmes said in *Patson v. Pennsylvania*, 232 U.S. 138, 144 (1914), "A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience."

Article XXXIV of the California Constitution does *not* in fact make a classification on the basis of poverty. It does, by its terms, apply only to a "low rent housing project" "for persons of low income". But to leap from that fact to a conclusion that it classifies people on the basis of poverty is quite impermissible.

With minor exceptions California treats *all* kinds of public housing alike. As stipulated, the only kind of housing any governmental agency in California provides, other than the housing to which Article XXXIV applies, is housing for state officials and university personnel. (App. 5)²⁹ Different treatment of housing assistance between employees of the State and all other persons is obviously a permissible classification. In short, Article XXXIV requires voter approval for *all* public housing projects sponsored by the State or its agencies and makes no classification of people for that purpose on any basis.

To say that Article XXXIV discriminates on the basis of poverty *because its subject matter is housing for persons of low income* simply ignores the fact that the only concern the State has with supplying housing is to supply it to persons of low income. There may be a *moral* duty to provide housing for those economically disadvantaged, or it may be prudent to do so as a prophylactic against social upheaval. But the Constitution imposes no command to do so, and therefore the Constitution imposes no command as to how the State is to go about determining when and if it shall do so. The subject of publicly supported housing is a subject by itself, and of its very nature it concerns those of low income.

29. Another category consists of houses acquired as an incident to the exercise of eminent domain, which the public authority disposes of as rapidly as it can—obviously a peculiar category all its own.

But, said the court below, Article XXXIV makes it more difficult to obtain federal aid for housing than for highways, urban renewal, hospitals, education, law enforcement assistance, and model cities (App. 1, pp. 7a, 8a). To this there are three answers.

First, a classification of housing different from these matters may be a classification different in kinds of public expenditure. It is no distinction based on any forbidden criterion.

Second, a distinction as between housing and other kinds of federal aid cited by the District Court is simply not the kind of classification denounced by the Equal Protection Clause.

Third, the reference by the court below to other federal aid is a passing one without citation of statutes and without a word in the record showing what the other programs may be. If a declaration of unconstitutionality is to be based on such matters, a plenary trial instead of disposition on summary judgment would seem obviously necessary to explore the nature of these things as a basis for comparison.

Only the other day this Court rejected the claim that exemption of church property from taxation (along with non-profit hospitals, art galleries and libraries) violated the Establishment Clause of the First Amendment. *Walz v. Tax Commission*, No. 135, Oct. Term 1969, 38 U.S.L. Week 4347 (May 4, 1970). There is no report of any contention by the appellant, a private owner of real estate, that the tax exemption violated the Equal Protection Clause by classifying him differently from the exempted non-profit organizations. But this Court would have been alert to that constitutional bar if it had existed, and we submit that the classification here is no less permissible than in the *Walz* case. Highways, colleges and law enforcement are so vastly different problems from public housing that these plaintiffs cannot be said to be "comparably situated" to highway users, etc.

THE VERY FEDERAL LEGISLATION WHICH LED TO ARTICLE XXXIV ILLUMINATES THE RATIONALITY OF THE CLASSIFICATION

Article XXXIV is a response to the invitation of the Housing Act of 1937.³⁰ That Act extends an invitation to the States to employ the funds and credit of the United States to bear some of the cost of alleviating housing shortages. The Act several times emphasizes that *local control* is its keynote policy. §§ 1, 15(7)(a, b), 42 U.S.C. §§ 1401, 1415(7)(a, b). Thus the United States Housing Authority may not enter into a contract for preliminary loan "unless the governing body of the locality involved has by resolution approved the application . . ." (§ 15(7)(a)) or into a contract for any other loan "unless the governing body of the locality has entered into an agreement . . . for . . . local cooperation . . ." (§ 15(7)(b)). All this is required "[i]n recognition that there should be local determination of the need for low-rent housing. . . ." 42 U.S.C. § 1415(7). In 1959, Section 1 of the Act (42 U.S.C. § 1401) was amended to state:

"It is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program * * *" (Act of Sept. 23, 1959, Pub.L. 86-372, Title V, § 501; 73 Stat. 679)

Where control is to be local, where federal law emphasized that desideratum, where the basic criterion is that there be "local determination of the need for low-rent housing" before such housing may be brought into a community and a major part of the cost be placed on the community, what more appropriate or permissible than that the voice of that local determination be the people themselves?

As we have seen (pp. 7, 8, *supra*), just 8 months after California adopted Article XXXIV in 1950, Congress provided in 1951 in the Independent Offices Appropriation Act that the

30. Act of Sept. 1, 1937, c. 896, 50 Stat. 888, as amended, 63 Stat. 422, 429, 73 Stat. 679, 82 Stat. 504; 42 U.S.C. §§ 1401, et seq.

United States Housing Authority "*shall not . . . authorize the construction of any projects*" in any locality in which the project may be "*rejected by the governing body of the locality or by public vote*". Congress repeated this prohibition in the Independent Offices Appropriation Act, enacted in 1952. By the Independent Offices Appropriation Act enacted in 1953, it specified that no housing should be authorized, nor any authorized go forward, "where the people of that community, by their duly elected representatives, or by referendum, have indicated they do not want it."

Although these Congressional restraints were not repeated after 1953 and are not now part of the Congressional enactment, we submit that they plainly demonstrate the rationality of placing low cost housing in a category of its own peculiarly justifying a requirement of voter approval. *The closer a subdivision of the government gets to the grass roots, the more reasonable is a classification requiring voter approval*, as witness the colonial New England town meeting.

To sustain the decision below is to reject the basic teaching of constitutional law that State classification does not violate the 14th amendment if any set of facts can be conceived that rationally supports it. One need not indulge in imagination to conceive a rational basis for Article XXXIV. It was stated in the Official Arguments on which Article XXXIV was adopted in 1950. It is exemplified in the growing body of sophisticated thought about housing outlined at pp. 17-20 above.

And, surely, to reject as utterly untenable a state constitutional classification on *summary judgment*, without trial and on the most cursory affidavits, is most extraordinary conduct. A respectful regard for the American federal system—for the unique relationship between the federal authority and state authority—should not countenance that kind of summary disposition. The acknowledged paramountcy of the federal authority is universally accepted because it is sensitively applied and exercises "scrupu-

lous regard for the rightful independence of the state governments". *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 500, 501 (1941).

C. The Purpose and Effect of Article XXXIV Are to Determine How State Power Shall Be Distributed by California Among Its Own Governmental Organs. Such a Provision Presents No Question Justiciable in a Federal Court

As we have seen (p. 26, *supra*), the federal Housing Act of 1937 was an invitation to the State to employ federal assistance upon *local determination* of its need. California accepted that invitation. Originally it did so on the basis that an administrative agency might make the necessary determinations. But the burden financially and environmentally falls on the local citizens. Therefore by Article XXXIV of the Constitution, California accepts the invitation now only on the basis that *the people themselves* determine the need and the desirability for low-rent housing in their communities. That determination by California does not implicate the Constitution of the United States in any manner. The sovereignty of a State rests in its people. The manner in which they distribute or parcel out its exercise is not a federal justiciable question. *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937); *Hughes v. Superior Court*, 339 U.S. 460, 466-67 (1950). They may retain all or any part of it in their own hands, as by the initiative or referendum. *Pacific Tel. Co. v. Oregon*, 223 U.S. 118 (1912). Granting some or all of that exercise of sovereignty to legislative bodies, state or local, they may retain or resume the remainder. As this Court said in *Highland Farms Dairy v. Agnew*, *supra*, at 612:

"The Constitution of the United States in the circumstances here exhibited has no voice upon the subject. The statute challenged as invalid is one adopted by a state. . . . How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."

And this is true even should it be true that, in practice, the State's decision may make it more difficult for any particular group within the State to obtain the advantages it desires, so long as the decision is grounded in neutral principle, as is Article XXXIV. *Hunter v. Erickson*, 393 U.S. 385 (1969). True, *Hunter v. Erickson* tells us that a "legislative structure which otherwise would violate the Fourteenth Amendment" is not immunized by popular referendum (p. 392). But that is not this case. Here it is not claimed that anything violates the Fourteenth Amendment except the provision for referendum itself! *Hunter v. Erickson* also tells us that the "sovereignty of the people is itself subject" to the constitutional limitation on the State. That principle, as *Hunter v. Erickson* itself applies it, reaches a rearrangement of the distribution of legislative powers on racially discriminatory lines. That is not this case either.

The plaintiffs' case here is a stupefying reversal of history. The initiative and referendum were borne of an urge to curb the power of the wealthy and entrenched so as to benefit the disadvantaged. Yet, now, they are attacked and enjoined as working to the disadvantage of the disadvantaged! To embark on the task of analyzing different forms of governmental structure to the end of determining which is more likely to be equally attuned to the demands or needs of all the groups in which the citizenry falls—and in one way or another everyone is a member of some minority—would call for divine wisdom. For a court to embark on that task and to utilize the 14th Amendment to redistribute the legislative powers of a state is to open up an unpredictable future. Today taxpayers in revolt may vote down bond issues that a timorous city council, subjected to the "confrontation" of pressure groups, would vote. Tomorrow legislative bodies may stand in the way of measures for which today's youth, then grown to maturity, will vote behind the privacy of the curtain of the polling booth. The Equal Protection Clause has been invoked and applied to protect and expand the people's right to vote, *Reynolds v. Sims*,

377 U.S. 533 (1964); *Harper v. Virginia Board of Elections*, 383 U.S. 633 (1969); now it has been invoked and applied below to deny the right to vote. This, we submit, is a misapplication.

In two recent cases Courts of Appeals have been called upon to consider state referendum statutes which came far closer than does Article XXXIV to violating the principles of *Hunter v. Erickson* and *Reitman v. Mulkey*. In each case the State's decision to submit a proposal to referendum was upheld against a charge of violation of Equal Protection. *Spaulding v. Blair*, 403 F.2d 862 (4th Cir. 1968); *Ranjel v. City of Lansing*, 417 F.2d 321 (6th Cir. 1969), cert. denied 38 U.S.L. Week 3364 (Mar. 16, 1970).

In *Spaulding v. Blair*, plaintiffs were Negroes who sought to prevent the submission of an open-housing amendment to referendum. Speaking for the court, Judge Sobeloff said, 403 F.2d at 864,

"No contention is made that a state may not constitutionally apportion its legislative power between elected representatives of the people and the people themselves. Nor is it suggested that Chapter 385, if approved by the voters, would be unconstitutional. In these circumstances, it must be concluded that a federal court is without power to enjoin a valid state legislative procedure."

In the *Ranjel* case, there was a petition for a referendum upon an ordinance rezoning a 20-acre site from one-family residential to a community unit plan, which would permit the construction of 250 low-rent housing units by a private developer using HUD funds. The plaintiffs, poor black and Mexican-Americans, sought to enjoin the referendum. The District Court granted an injunction. Citing *Hunter v. Erickson*, *Reitman v. Mulkey*, and *Spaulding v. Blair*, the Court of Appeals reversed. It said, 417 F.2d at 324,

"Initiative and referendum is an important part of the state's legislative process. Being founded on neutral principles, it should be exempt from Federal Court constraints."

These, we submit, are the principles that control this case. They were completely overlooked by the court below.

It is well to return to the language of the Equal Protection Clause of the 14th Amendment:

"No state * * * shall * * * deny to any person within its jurisdiction the equal protection of the laws."

As a matter of explicit English direction, this prescribes that, regardless of who makes the law, it shall operate alike on all in like situation. It asserts nothing about how laws shall be made unless the very manner of their making *indubitably and inevitably* works a discrimination in their operation. *That is not this case.*

CONCLUSION

We submit that the question presented by this appeal is substantial, that, if any summary disposition is to be made of this appeal, it should be a summary order of reversal, and that the very least that should be done is to note jurisdiction and deny the motion to dismiss or affirm.

Dated, San Francisco, California, June 3, 1970.

Respectfully submitted,

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(Appendices Follow)

Appendix 1

*The United States District Court
Northern District of California*

Filed—Mar 23 1970
C.C. Evensen, Clerk

Anita Valtierra, et al.,

Plaintiffs,

vs.

The Housing Authority of the
City of San Jose, et al.,

Defendants.

NO. 52076

Gennie Hayes, et al.,

Plaintiffs,

vs.

Housing Authority of San Mateo,

Defendant.

NO. C-69-1-RFP

Before HAMLIN, Circuit Judge, and PECKHAM and LEVIN,
District Judges.

PECKHAM, District Judge:

This matter comes before this Court on plaintiffs' motions for summary judgment, their applications for an injunction, and defendants' motions to dismiss. Plaintiffs ask that we declare Article XXXIV of the California State Constitution¹ to be unconstitutional and request that we forbid defendants from relying upon it as a reason for not requesting federal assistance with which to finance

1.

ARTICLE XXXIV
PUBLIC HOUSING PROJECT LAW

§1. Approval of electors; definitions

Section 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the

low-income housing. We hold Article XXXIV to be unconstitutional. *Hunter v. Erickson*, 393 U.S. 385 (1969).

Title 42 U.S.C. § 1983 creates a cause of action for the deprivation, under color of state law, of any right, privilege or immunity guaranteed by the United States Constitution. In this case, the non-federal defendants are acting under color of Article XXXIV in not requesting federal assistance. Equal protection cases brought to remedy discrimination against the poor (e.g., *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Shapiro v. Thompson*, 394 U.S. 618 (1969)), have long been entertained under § 1983. Jurisdiction to hear this case is conferred upon this Court by 28 U.S.C. §1343(3), (4).

This case is required to be heard by a three-judge court by 28 U.S.C. §§ 2281, 2284, as plaintiffs seek an injunction enjoining defendant local officials from enforcing a state constitutional provision (see *A.F.L. v. Watson*, 327 U.S. 582 (1946)) on the ground of its repugnance to the Equal Protection Clause.

Two cases are consolidated for consideration. The first is *Valtierra v. Housing Authority of San Jose*, No. 52076. The parties

case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

For the purposes of this article the term "low rent housing project" shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. For the purposes of this article only there shall be excluded from the term "low rent housing project" any such project where there shall be in existence on the effective date hereof, a contract for financial assistance between any state public body and the Federal Government in respect to such project.

For the purposes of this article only "persons of low income" shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

plaintiff are "persons of low income," who have been determined to be eligible for public housing, and have been placed on the appropriate waiting lists. They are unable to occupy public housing because at present none is available. The second case, *Gussie Hayes, et al. v. Housing Authority of San Mateo*, No. C-69-1-RFP, is consolidated with the first because of the identity of the legal issue, and is brought by similarly situated poor persons, predominately Negro, on the waiting list for public housing in San Mateo County.

Plaintiffs have demonstrated that Article XXXIV has impeded the financing of new housing, only 52% of the referenda submitted to the voters have been approved, even though they cannot of course demonstrate that any particular named plaintiff would be able to occupy new housing if such housing were built. In Santa Clara County, the voters defeated the referendum seeking permission to obtain housing funds in 1968, and in San Mateo County two similar referenda were defeated in 1966. Housing Director Wemen, in San Mateo County, feels it would be fruitless to attempt another referendum at present. [Affidavit J to *Hayes* complaint.] Plaintiffs' position is that but for the existence of Article XXXIV, local housing authorities would be able to apply for federal assistance if they chose; they further submit that there is evidence that in fact they would so choose. [See *Valtierra* complaint p. 8].

There are three groups of defendants in the *Valtierra* case: the Housing Authority of the City of San Jose, a public entity, and its members in their official capacity; the City Council of San Jose, a public entity, and its members, in their official capacity; and the Department of Housing and Urban Development and its Secretary, George Romney. All three groups have filed responsive pleadings. There is only one defendant in the *Hayes* case, the Housing Authority of San Mateo County. The Court notes that this defendant has not made an appearance in the case, but rather has chosen to stand mute.

The federal defendants, the Department of Housing and Urban Development (HUD), and its Secretary, George Romney, move

for dismissal on the ground that, as to them, the *Valtierra* complaint does not state a claim upon which relief can be granted. Fed.R.Civ.P. Rule (12)(b)(6). The complaint does not seek any relief against the federal defendants; their joinder is not necessary in order to grant the relief that is requested. Therefore this Court ORDERS that their motion for dismissal be granted. Accordingly, the federal defendants are dismissed from this lawsuit. The *Hayes* case does not involve any federal defendants.

The two non-federal defendants in the *Valtierra* case, viz., the Housing Authority of San Jose, and the City Council of San Jose, raise several pleas in abatement which do not preclude this Court from reaching the merits of plaintiffs' constitutional claim. First, defendants contend that because California could decline to participate in the program established by the Housing Act of 1937, that California can participate on any condition. This is not the case. Certainly a condition that no Negro could occupy such low-income housing would be unconstitutional. Second, they assert that referenda are not subject to constitutional scrutiny. This is not the law. *Hunter v. Erickson, supra*. Third, defendants erroneously believe plaintiffs are asking this Court to compel the Housing Authorities to seek federal funding. However, plaintiffs only seek an injunction forbidding the named local officers from relying on Article XXXIV as a reason for not requesting such funds. There may be any number of reasons, quite apart from Article XXXIV why the Housing Authorities might not wish to seek federal funds at any given point in time.

We find plaintiffs' Supremacy Clause argument to be unpersuasive and therefore do not decide the case on that ground. Plaintiffs' Privileges and Immunities argument is not reached as this Court decides the case on Equal Protection grounds.

PLAINTIFFS' EQUAL PROTECTION ARGUMENT

The starting point for this argument is the now well-established standard that classifications based on race are "constitutionally sus-

pect," *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), and those based on property "traditionally disfavored," *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668 (1966). Both bear a far heavier burden of justification than other classifications. See, *McLaughlin v. Florida*, 379 U.S. 184, 194 (1964).

The gravamen of plaintiffs' Equal Protection claim is that the express discrimination in Article XXXIV, as it applies only to "low-income persons", brings it squarely within the ban of a long line of Supreme Court decisions forbidding the unequal imposition of burdens upon groups that are not rationally differentiable in the light of any legitimate State legislative objective. E.g., *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Carrington v. Rash*, 380 U.S. 89 (1965); *Baxstrom v. Herrold*, 383 U.S. 107 (1966); and *Rinaldi v. Yeager*, 384 U.S. 305 (1966). As characterized by the Court in *McLaughlin v. Florida*, 379 U.S. at 191:

Judicial inquiry under the Equal Protection Clause, . . . does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question . . . whether there is an arbitrary or invidious discrimination between those classes covered . . . and those excluded.

It is no longer a permissible legislative objective to contain or exclude persons simply because they are poor. *Edwards v. Calif.*, 314 U.S. 160 (1941); *Shapiro v. Thomson*, 394 U.S. 618 (1969). Cf., *Griffin v. Illinois*, 351 U.S. 12, 16-17 (1956).

In addition to asserting that Article XXXIV denies equal protection of the laws to persons who are poor, the *Hayes* plaintiffs assert that it also denies equal protection to those who are Negro. Although Article XXXIV does not specifically require a referendum for low-income projects which will be predominantly occupied by Negroes or other minority groups, the equal protections clause is violated if a "special burden" is placed on those groups by the operation of the challenged provision, if "the reality is that the law's impact falls on the minority." *Hunter v. Erickson*, *supra*, at 391.

Thus, last term, the Supreme Court in *Hunter v. Erickson*, *supra*, applied to the housing area the constitutional requirement for equal protection. In that case, the Supreme Court invalidated an amendment to the City Charter of Akron, Ohio, which required a referendum before anti-discrimination legislation could be enacted. The Court held this to be impermissible, stating that it violated the Equal Protection Clause for at least three reasons:

First, only laws designed to end housing discrimination were required to run the gauntlet of a referendum, and the state cannot make it more difficult to enact legislation on behalf of one group than on behalf of others. The *Hunter* court speaking through Mr. Justice White states, 393 U.S. at 390-91:

It is true that the section [requiring a referendum before action may be taken] draws no distinction among racial and religious groups. Negroes and whites, Jews and Catholics are all subject to the same requirements if there is housing discrimination against them which they wish to end. But § 137 [requiring the referendum] nevertheless disadvantages those who would benefit from laws barring racial . . . discrimination as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor. The automatic referendum system does not reach housing discrimination on sexual, or political grounds, or against those with children or dogs, nor does it affect tenants seeking more heat or better maintenance from landlords, nor those seeking rent control, urban renewal, public housing, or new building codes.

Second, the law's impact falls on minorities, resulting in an impermissible burden which constitutes a substantial and invidious denial of equal protection.

"Moreover, although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that. Like the law requiring specification of candidates' race on

the ballot [citation omitted], § 137 places special burdens on racial minorities within the governmental process. This is no more permissible than denying them the vote, on an equal basis with others. [citations omitted] 393 U.S. at 391."

Lastly, the court noted, 393 U.S. at 392:

... [I]nsisting that a State may distribute legislative power as it desires and that the people may retain for themselves the power over certain subjects may generally be true, but these principles furnish no justification for a legislative structure which otherwise would violate the Fourteenth Amendment. Nor does the implementation of this change through popular referendum immunize it. [Citations omitted.] The sovereignty of the people is itself subject to . . . constitutional limitations. . . .

Here, as in the *Hunter* case, the "special burden" of a referendum is not ordinarily required; here, as in the *Hunter* case, the impact of the law falls upon minorities.² The vice in this case is that Article XXXIV makes it more difficult for state agencies acting on behalf of the poor and the minorities to get federal assistance for housing than for state agencies acting on behalf of other groups to receive financial federal assistance. In California, state agencies may seek federal financial aid, without the burden of first submitting the proposal to a referendum, for all projects except low-income housing. Some common examples,

2. That minority groups comprise "the poor" is increasingly clear. In his affidavit, Mr. Franklin Lockfeld, Senior Planner for the Santa Clara County Planning Department stated: "The low-income areas are closely related to the areas of concentration of minority residents and high income areas are closely related to the nearly all white sections of the community. . . . In 1960, only 5% of the units occupied by white-non-Mexican-Americans were in delapidated or deteriorated condition, while 23% of the units occupied by Mexican-Americans and 20% of the units occupied by non-whites were in delapidated or deteriorated condition. Minorities were thus over represented in the less than standard housing by greater than four to one, and occupied nearly one-third of the deteriorating and delapidated housing in the County in 1960."

inter alia, are: highways, urban renewal, hospitals, colleges and universities, secondary schools, law enforcement assistance, and model cities. Further, even though federal assistance for state housing agencies is a privilege which California need not seek at all, the requirements of equal protection must still be met. *U.S. v. Chicago, M., St.P. & P. R.R.*, 282 U.S. 311, 328-29 (1931); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Shapiro v. Thomson*, *supra*.

Defendants argue that Article XXXIV does not violate the Equal Protection Clause because it was not the product of unconstitutional motivations. However, although proof of bad motive may help to prove discrimination, lack of bad motive has never been held to cure an otherwise discriminatory scheme. Certainly *Hunter* does not demand a demonstration of improper motivation.

Accordingly, plaintiffs' motions for summary judgment, declaring Article XXXIV to be unconstitutional, and their applications for an injunction are granted.

IT IS SO ORDERED.

/s/ O. D. HAMLIN
United States Circuit Judge

/s/ ROBERT F. PECKHAM
United States District Judge

/s/ GERALD S. LEVIN
United States District Judge

Appendix 2

*In the United States District Court
Northern District of California*

Gussie Hayes, Diane Hayes, Carolyn Hayes, Cathy Hayes, Tommy Hayes, Barbara Hayes, Danny Hayes (by their general guardian, Gussie Hayes), Iota Weatherwax, Carroll Peil, Lawrence Peil, Mary Peil, Donna Peil, Robert Weatherwax (by their general guardian, Iota Weatherwax), Jo-Brown, Karen Jackson, Kevin Jackson, Kenneth Jackson (by their general guardian, Jo-Ann Brown), Shirley Mae Luke, Sylvester Jones (by his general guardian, Shirley Mae Luke), on their own behalf and on behalf of all persons similarly situated,

Plaintiffs,

vs.

The Housing Authority of San Mateo County, a public entity; William G. Weman, individually and as Executive Director of the Housing Authority of San Mateo County; Benjamin Ichinose; Ben Albrecht; Perry A. Bygdnes; Raymond Rucker; and James A. Tassos, individually and as Commissioners of the Housing Authority of San Mateo County,

Defendants.

Civil Action
No. C-69-1 RFP

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Plaintiffs,

VS.

The Housing Authority of the City of San Jose, a public entity; Rodmar H. Pulley, individually and as Executive Director of the Housing Authority of the City of San Jose; Mary R. Boyce, individually and as Chairman of the Board of Commissioners of the Housing Authority of the City of San Jose, Walter Rector, individually and as Vice-Chairman of the Board of Commissioners of the Housing Authority of the City of San Jose; David Reiser; Allen Bel-
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judgment having been presented and the Court being full advised, and having considered the pleadings, motions and affidavits, and after hearing oral arguments, and the Court having determined that there is no genuine issue of material fact,

The Court finds that the plaintiffs in both causes are entitled to summary judgment as a matter of law.

Therefore it is ORDERED, ADJUDGED and DECREED that:

A. The motions of plaintiffs for summary judgment in their favor are granted;

B. Article XXXIV of the California Constitution is declared unconstitutional and shall have no further force and effect for the reasons set forth in this Court's opinion filed March 23, 1970;

C. The defendants, The Housing Authority of San Mateo County, a public entity; William G. Weman, individually and as Executive Director of the Housing Authority of San Mateo County; Benjamin Ichinose; Ben Albrecht; Perry A. Bygones; Raymond Rucker and James A. Tassos, individually and in their official capacities as Commissioners of the Housing Authority of San Mateo, their successors in office, agents, servants, employees and attorneys and all other persons in active concert or participation with them be and hereby are permanently restrained and enjoined from abiding by or relying upon Article XXXIV as a reason for not requesting state or federal assistance with which to finance low income housing;

The defendants, The Housing Authority of the City of San Jose, a public entity; Rodmar H. Pulley, Mary R. Boyce, Walter Rector, David Reiser, Allen Bellandi and Sam Obregon, in their official capacities; the City Council of the City of San Jose, Ronald James, Virginia C. Shaffer, Joseph Colla, Walter V. Hays, David J. Goglio, Kurt Gross, in their official capacities; their successors in office, agents, servants, employees and attorneys and all other persons in active concert or participation with them, be and hereby are permanently restrained and enjoined from

12a

abiding by or relying upon Article XXXIV as a reason for not requesting state or federal assistance with which to finance low income housing.

Dated: April 2, 1970.

/s/ O. D. HAMLIN
United States Circuit Judge
/s/ ROBERT F. PECKHAM
United States District Judge
/s/ GERALD S. LEVIN
United States District Judge

Appendix 3

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*The United States District Court
 Northern District of California*

FILED—APR 10 1970
 CLERK, U.S. DIST. COURT
 SAN FRANCISCO

Anita Valtierra, et al.,

Plaintiffs,

vs.

The Housing Authority of the
 City of San Jose, et al.,

Defendants.

No. 52076

Gussie Hayes, et al.,

Plaintiffs,

vs.

Housing Authority of San Mateo,

Defendant.

No. C-69-1-RFP

NOTICE OF APPEAL

Notice is hereby given that Ronald James, Virginia C. Shaffer, Joseph Colla, Walter V. Hays, David J. Goglio, Kurt Gross, and Norman Y. Mineta, defendants, hereby appeal to the Supreme Court of the United States from the declaratory judgment entered

in this action on April 2, 1970, and from the permanent injunction issued and entered on said date.

This appeal is taken pursuant to Title 28, Section 1253 of the United States Codes.

Dated: April 6, 1970

FERDINAND P. PALLA

City Attorney

By RICHARD W. MARSTON

Richard W. Marston

Deputy City Attorney

Appendix 4**EXTRACT FROM 1950 BALLOT
PAMPHLET PUBLISHED BY SECRETARY OF STATE**

10 PUBLIC HOUSING PROJECTS. REQUIRING ELECTION TO ESTABLISH. Initiative Constitutional Amendment. Adds Article XXXIV to Constitution. Requires approval of majority of electors of county or city, voting at an election, as prerequisite for establishment of any low-rent housing project by the State or any county, city, district, authority, or other state public body. Defines low-rent housing project as living accommodations for persons of low income financed or assisted by Federal Government or state public body. Exempts any project subject to existing contract between state public body and Federal Government. YES ☐ NO ☐

Analysis by the Legislative Counsel

This constitutional amendment prohibits the development, construction, or acquisition of any low-rent housing project by the State, or any city, city and county, county, district, authority, agency or other subdivision or public body of the State until approved by a majority vote of the electors of the city, town, or county in which the project is to be located.

"Low-rent housing project" is defined as any development composed of urban or rural dwellings, apartments, or other living accommodations for persons of low income, financed in whole or in part by the United States or any of its agencies or instrumentalities, or by the State or any of its agencies or public bodies, or to which the Federal Government or the state public body extends assistance by supplying labor, guaranteeing the payment of liens, or otherwise, except where a contract for financial assistance between any state public body and the Federal Government in respect to such project is in existence on the effective date of the amendment.

"Persons of low income" means persons or families who lack the income necessary (as determined by the state public body developing, constructing, or acquiring the project) to enable them without financial assistance to live in decent, safe, and sanitary dwellings, without overcrowding.

The amendment would be self-executing, but legislation to facilitate its operation may be enacted.

Argument in Favor of Initiative Proposition No. 10

A "YES" vote for this proposed constitutional amendment is a vote neither for nor against public housing. It is a vote for the future right to say "yes" or "no" when the community considers a public housing project.

Passage of the "Public Housing Projects Law" will restore to the citizens of a city, town, or county, as the case may be, the right to decide whether public housing is needed or wanted in each particular locality. Such is not the case at present.

Time after time within the past year California communities have had public housing projects forced upon them without regard either to the wishes of the citizens or community needs. This is a particularly critical matter in view of the fact that the long-term, multimillion-dollar public housing contracts call for tax waivers and other forms of local assistance, which the Federal Government says will amount to HALF the cost of the federal subsidy on the project as long as it exists.

For government to force such additional hidden expense on the voters at a time when taxation and the cost of living have reached an extreme high is a "gift" of debatable value. It should be accepted or rejected by ballot.

If, on the other hand, certain communities are in such dire need of housing that the cost of long-term subsidization is deemed

worth while, local voters, who best know that need, should have the right to express their wishes by ballot.

In either case, a "YES" vote for this proposed amendment will strengthen local self-government and restore to the community the right to determine its own future course.

Furthermore, the financing of public housing projects is an adaptation of the principle of the issuance of revenue bonds. Under California law, revenue bonds, which bind a community to many years of debt, cannot be issued without local approval given by ballot. Public housing and its long years of hidden debt should also be submitted to the voters to give them the right to decide whether the need for public housing is worth the cost.

A "YES" vote for the "Public Housing Projects Law" is a vote for strong local self-government. It is an expression of confidence in the community's future and in the democratic process of government. To strengthen the grass roots democracy which has made America protector of the world's free peoples, vote "YES" on the Public Housing Projects Law.

EARL DESMOND

State Senator, Sacramento County

FREDERICK C. DOCKWEILER

Argument Against Initiative Proposition No. 10

This proposition should be defeated because: (1) it is wholly unnecessary; (2) it is contrary to firmly established principles of American representative government; (3) if adopted, it would be impossible to act expeditiously in times of emergency; (4) it would substantially increase the tax load in cities and counties of the State.

There is no necessity for a constitutional amendment such as here proposed, prohibiting the development, construction and acquisition of low-rent housing projects without submission of

the issue to the vote of the people in general or special elections to be held for the particular purpose in each city, town, or county of the State. This would be time-consuming and expensive. (A single special election in the City of Los Angeles would cost \$400,000.) The total cost to taxpayers of the State for holding special elections would be staggering.

California now has an adequate statute relating to the subject—"The California Housing Authorities Law, Act 3483"—which provides that no low-rent housing project can be undertaken "until the governing body of the city or county * * * approves said project by resolution duly adopted." This law was passed in 1938 and has been amended several times.

If the proponents of this measure desire to change the legal procedure for local approval of low-rent housing projects, they should make their recommendations to the Legislature and ask for amendment of the law rather than freeze into the State Constitution (already too voluminous) provisions relating to local governmental administrative procedure.

The people already have adequate control through election of their representatives in the State Legislature, city councils, and boards of supervisors, and through the exercise of the initiative, referendum and recall.

This proposed measure is an attempt to discourage the construction of new low-rent housing projects (in which veterans have preference) by setting up a slow, cumbersome and costly procedure to make use of federal funds that would in any event be expended in other states without in any way benefiting taxpayers of California.

In a national emergency it may become necessary to quickly provide housing for industrial workers in certain areas. In the event of an atomic bomb attack emergency housing would have to be provided immediately for local residents. Elected representatives of the people in the State Legislature, in city councils

and boards of supervisors should be free to act promptly to meet pressing needs in any contingency, rather than be placed in a legal straitjacket.

This proposed constitutional amendment is not in the public interest. Vote NO on Proposition No. 10.

CHRIS N. JESPERSEN

State Senator, Twenty-ninth District

C. J. HAGGERTY, *Secretary*

California State Federation of Labor

(A. F. of L.)

FLETCHER BOWRON, *Mayor*

of the City of Los Angeles

Appendix 5

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*United States District Court
 Northern District of California*

FILED—Nov 28 1969
 CLERK, U.S. DIST. COURT
 SAN FRANCISCO

Anita Valtierra, et al.,

Plaintiffs,

vs.

The Housing Authority of the
 City of San Jose, et al.,

Defendants.

Civil Action
 No. 52076

STIPULATION OF FACT

IT IS HEREBY STIPULATED by and between the attorneys for the plaintiffs and the municipal defendants herein that the following facts are true and are not controverted herein:

No type of housing is owned or leased by any state public body of the State of California (i.e., by any non-federal public entity in California) for residential purposes other than housing for rental to persons of low income, as such persons are defined by Article 34 of the California Constitution, except the following:

(1) Housing owned or leased by the Regents of the University of California, or by the State Colleges of California, for rental to students, faculty and certain administrative officers. Such hous-

ing, although mostly rent subsidized, is not available for occupancy by the public at large, and it is made available without regard to the income or the estate of the prospective occupant;

(2) Housing owned by various, non-federal public entities acquired incidentally by negotiation or eminent domain proceedings for non-housing, public works purposes (such as street widenings, highway construction, parks, school construction, sewer and drain line construction, and other public works projects) which housing is often rented by said entities on a month-to-month, temporary basis either to the former owners, to tenants of the former owners, to local housing agencies for subletting to persons of low income or directly by such entities to persons of low income until such time as the destruction or other removal of such housing is necessary to complete said public works projects; and

(c) Housing for employees of State institutions such as State hospitals and prisons, for employees of State parks or historical monuments, and the Governor's mansion.

Dated: Nov 26 1969

FERDINAND P. PALLA,
City Attorney

By RICHARD W. MARSTON
Richard W. Marston

Attorneys for municipal defendants

/s/ DIANE V. DELEVETT
Attorney for plaintiffs

FILE COPY

Office Supreme Court,
FILED

MAY 16 1970

IN THE
Supreme Court of the United States

JOHN E. DAVIS, CLERK

OCTOBER TERM, 1969

No. ~~1555~~ 154

RONALD JAMES, et al.,

Appellants,

—v.—

ANITA VALTIERRA, et al.,

GUSSIE HAYES, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

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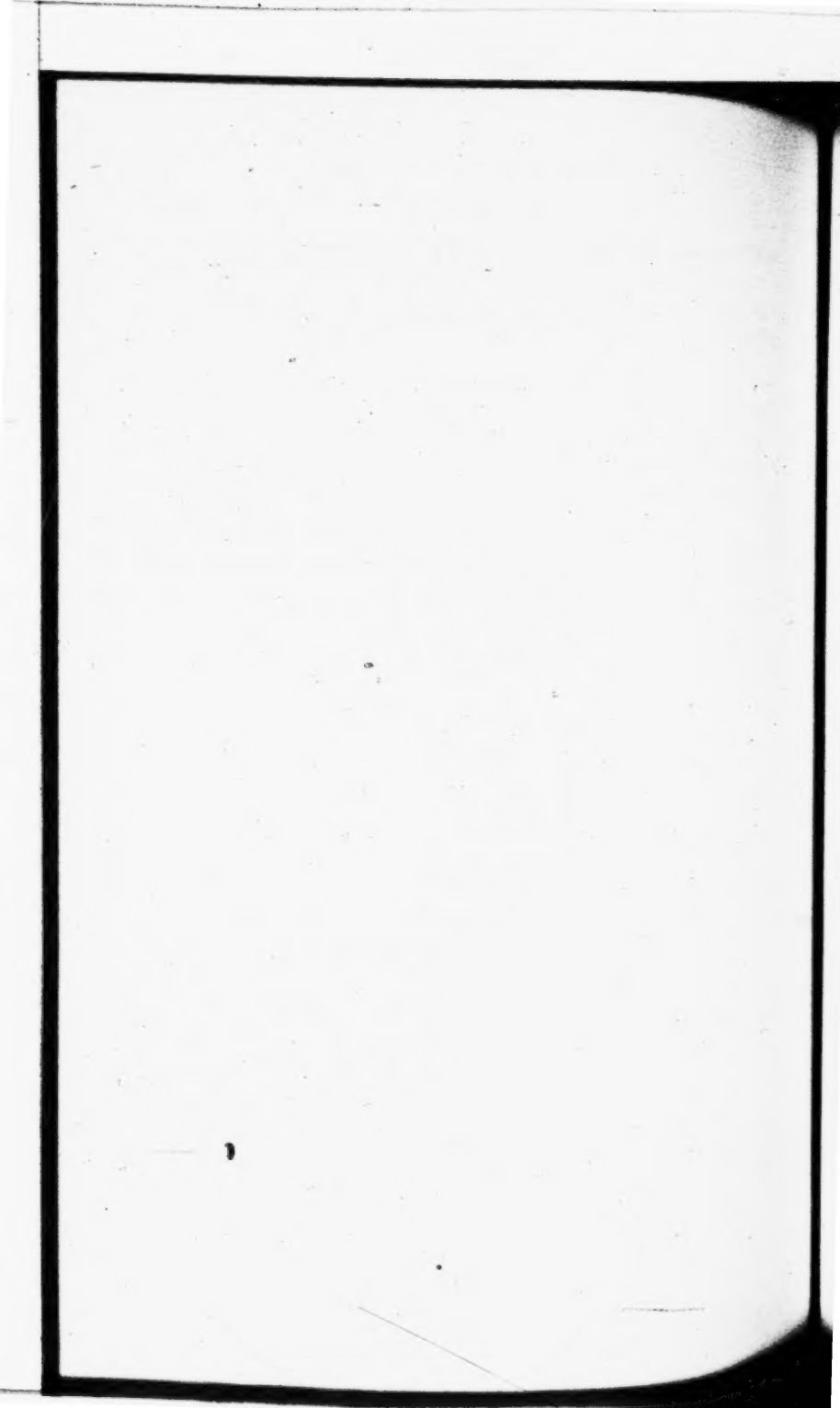
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1969

No. 1557

RONALD JAMES, et al.,

Appellants,

—v.—

ANITA VALTIERRA, et al.,

GUSSIE HAYES, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

Appellees ANITA VALTIERRA, et al., and GUSSIE HAYES, et al., respectfully move the Court, pursuant to Rule 16(1)(c) of the Rules of the Court, to affirm the judgment below, and in support thereof would show that plenary consideration of this appeal is unnecessary because the decision below is clearly correct.

This motion is also made pursuant to Rule 16(1)(d) of the Rules of the Court because of the following reasons. The housing shortage affecting the poor in San Jose, and in San Mateo County, has reached crisis proportions. Appellants have represented in their Jurisdictional Statement at p. 16, that HUD officials and bond counsel cannot assure

that they will take the necessary steps to alleviate this crisis until the constitutionality of Article 34 has been ruled on by this Court, and the case finally disposed of; this is true even though the court below denied appellants' motion to stay the execution of judgment. It is our understanding that while the Court will be in session for a month or more, the Court's argument term has ended; if this understanding is correct, in no way can this case be disposed of during the current term if plenary consideration is given.

CITATION TO OPINION BELOW

The opinion below is not yet reported. The full text of the opinion is attached as Appendix A, in the Jurisdictional Statement.

JURISDICTION

Jurisdiction of this appeal is founded upon 28 U.S.C. § 1253, in that injunctive relief was sought and obtained from a three judge district court, constituted pursuant to 28 U.S.C. § 2281 and § 2284, against the enforcement of a provision of the Constitution of the State of California on the ground that it violates the Constitution of the United States both on its face and as applied.

STATUTE INVOLVED

Article 34 is reported in full at page 4 of the Jurisdictional Statement.

QUESTION PRESENTED

Was the court below correct in enjoining the enforcement of Article 34 after finding it violated the Equal Protection Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

This is a direct appeal from the final judgment and decree entered on April 2, 1970, by a District Court of three judges, granting appellees' motions for summary

judgment, declaratory judgment and permanent injunction. This case originated as two separate class actions, one filed on behalf of plaintiffs in San Jose, and the other on behalf of plaintiffs in San Mateo County. The cases were consolidated for all purposes by the court below.

Appellees are all "persons of low income," found eligible for public housing, and placed on the waiting lists of their local Housing Authorities. Of the forty-one named appellees, thirty-seven constitute a racial minority: twenty-four are Black, and thirteen are Mexican-American. They now live in overcrowded, rundown, rat-infested, roach-infested dwellings. For even this sort of unsafe, unsanitary and demeaning housing, they are required to pay rents that are exorbitant in light of their income, with the result that they are deprived of other necessities, such as clothing. More than 2,625 families are in the same condition as appellees, and share the waiting list for low-rent housing.¹ They have not been placed in low-rent units by the local Housing Authorities because no units are available.

The only possible hope of providing safe, sanitary and decent housing for these thousands of poor people lies in the development of public housing projects under the United States Housing Act of 1937 (42 U.S.C. §§ 1401, *et. seq.*) Pursuant to that Act, local Housing Authorities may develop public housing adequate to their needs, and available within their means by the use of Federal funds. In order to implement the Housing Act of 1937, California

1. At the time the complaints were filed there were over 2,000 families on the waiting list of the San Mateo County Housing Authority, *see* Affidavit of William G. Weman, Executive Director of the Housing Authority of San Mateo County attached to the *Hayes* complaint as Exhibit J, and 625 eligible families on the waiting list of the Housing Authority of the City of San Jose, *see* paragraph 21, page 9, of the *Valtierra* complaint. All the *Valtierra* appellees have been on the San Jose waiting list for more than one year.

enacted the Housing Authorities Law (Health and Safety Code §§ 34,200 *et. seq.*) That law included specific legislative findings that unsanitary and unsafe dwelling accommodations exist in the State where persons of low income are found to reside; that there is a shortage of safe and sanitary dwelling accommodations available at rents which low income people can afford; and that such conditions constitute a menace to the health, safety, morals, and welfare of the residents of the State.

The Housing Authorities Law also provides that a public corporate body can be formed in each county and city, and is to be known as the Housing Authority. That Authority cannot transact business or exercise powers unless the governing body of the county or city declares that there is a need for an Authority. On March 18, 1941, by Resolution No. 468, the Board of Supervisors of San Mateo County declared the need for a Housing Authority pursuant to the Housing Authorities Law. The Resolution is attached as Exhibit G to the *Hayes* complaint (Record on Appeal). On January 17, 1966, by Resolution No. 28614, the City Council of the City of San Jose declared the need for a Housing Authority pursuant to the Housing Authorities Law. The Resolution is attached as Exhibit F to the *Valtierra* complaint (Record on Appeal).

Once need is established and a Housing Authority has been activated, a professional staff is hired to develop plans for participation in leasing and construction programs. For new construction, the Housing Authority will develop an application for a preliminary loan; the loan money is used to pay for an option on a site, for the preparation of project plans, and for other development expenses. Federal law requires that the local governing body of the city or county consent before the application for a preliminary loan is sent to HUD. Thus, even before money to put an option on a site

is granted, experts from the local governing body, the local housing authority and the federal government have looked over the plans and have determined not only that the project is needed, but also that it is well planned, feasible as to cost and size, and complies with myriad technical requirements.

When a project has been completely planned and approved, the Housing Authority issues federally guaranteed, tax-free bonds for sale to the public. With the proceeds of the sale, the Housing Authority repays the preliminary loan, purchases land and constructs the units. An Annual Contribution Contract by which the purchasers of bonds are repaid, and a contract with the city or county for "payments in lieu of taxes" (usually 10% of rents) to meet the cost of municipal services, are negotiated. No local funds are used; the cost of the program is borne completely by the federal government and by the tenants of the housing units.

Article 34 interjects the referendum requirement after need has already clearly been ascertained and before any of the above technical work has been done. No one pretends approval is based on the public's expertise in the housing field. The question presented is whether or not the electorate wants public housing for the poor and minorities in their neighborhoods.

The effect of Article 34 on low income housing has been disastrous. From November, 1950 to January, 1969, 31,071 low-rent units were proposed on ballots across California. Forty-eight percent or 14,997 units were defeated. Additional units were not even proposed because of the cost of an election and the knowledge that the issue would be defeated (see Affidavit of William G. Weman, Executive Director of the Housing Authority of the County of San Mateo, attached as Exhibit J to the *Hayes* complaint). In

addition, Article 34 has caused California to fall behind other states in the construction of low-rent units. With 8% of the nation's poor, California has only 4% of the low income housing units. California has constructed 23.4 low income units per 1,000 low income family groups compared with 60.1 per 1,000 in Pennsylvania, 66.7 per 1,000 in New York, and 73.1 per 1,000 in Illinois.

ARGUMENT

The District Court Was Clearly Correct in Concluding That Article 34 Violates the Fourteenth Amendment to the United States Constitution.

This Court has traditionally disfavored two types of classifications: those based on race and those based on property. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668 (1966). Both classifications must be justified by more than the usual rationally related legislative objective in order to withstand constitutional scrutiny. *See McLaughlin v. Florida*, 379 U.S. 184, 194 (1964).

This case involves both these disfavored classifications. Article 34 on its face requires a referendum only for people who "lack the amount of income which is necessary . . . to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding"; and in practice and effect, Article 34 places a special burden on minorities because black and brown people comprise a very large percentage of those covered by its requirements, and because they are traditionally discriminated against in housing, and subject to discrimination by the public through housing referenda.

Under California and federal law, federal, state or local funds are available for various types of housing and other construction schemes, *e.g.* insured mortgages, reduced interest rates, and loan guarantees. Federally-financed low

income housing of the type governed by Article 34 is the only kind of these various construction schemes which is primarily or solely intended to benefit the poor. It is the only kind which is required by California Law to have referendum approval. Moreover, the court below found:

The vice in this case is that Article 34 makes it more difficult for state agencies acting on behalf of the poor and the minorities to get federal assistance for housing than for state agencies acting on behalf of other groups to receive financial federal assistance. In California, state agencies may seek federal financial aid, without the burden of first submitting the proposal to a referendum, for all projects except low income housing. Some common examples, *inter alia*, are: highways, urban renewal, hospitals, colleges and universities, secondary schools, law enforcement assistance, and model cities. [Opinion below, at Appendix A, Appellants' Jurisdictional Statement, p. ix.]

This Court has long held that a state may not constitutionally burden or exclude the poor simply because they are poor. *Edwards v. California*, 314 U.S. 160 (1941); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Griffin v. Illinois*, 351 U.S. 12 (1956), *Eskridge v. Washington State Board*, 357 U.S. 214 (1958); *Burns v. Ohio*, 360 U.S. 252 (1959); *Smith v. Bennett*, 365 U.S. 708 (1961); *Draper v. Washington*, 372 U.S. 487 (1963); *Lane v. Brown*, 372 U.S. 477 (1963); *Douglas v. California*, 372 U.S. 353 (1963); *Long v. District Court*, 385 U.S. 192 (1966); *Anders v. California*, 386 U.S. 738 (1967). There must be some other, over-riding legislative objective which justifies the imposition of a special burden on this group. Appellants have offered no legislative objective at all which requires the imposition of the referendum burden.

Last term this Court dealt with a similar problem in *Hunter v. Erickson*, 393 U.S. 385 (1969). An ordinance which required a referendum before enactment of any ban on racial, religious or ethnic discrimination in housing was held violative of the Equal Protection Clause because it:

... [D]isadvantages those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations or would otherwise regulate the real estate market in their favor. *Hunter v. Erickson*, 393 U.S. at 391.

Thus Article 34 would create an invidious classification even if appellees and their class were all poor and white.

It is vital to remember, however, that black and brown minority peoples comprise a very large percentage of those who would benefit from low income housing.² In areas such as San Mateo County the words "public housing" and "black" are synonymous and racial discrimination is still openly practised in housing.³ It is clear that this Court re-

2. The District Court's finding that minority groups comprise "the poor" is amply supported by (1) The uncontroverted affidavit of Franklin Miles Lockfeld, Senior Planner for the Santa Clara County Planning Department (attached to *Valtierra* Motion for Summary Judgment), (2) *Building the American City*, Report of the National Commission on Urban Problems to the Congress and to the President of the United States, Government Printing Office, House Document 91-34, pages 190-191 [The Douglas Commission Report], (3) *Summary of Housing in California*, Governor's Advisory Commission on Housing Problems, January 1963. (4) *More than Shelter, Social Needs in Low and Moderate Income Housing*, report of the National Commission on Urban Problems to the Congress and to the President of the United States, Government Printing Office, Research Report No. 8, p. 35 (1968).

3. See the eleven uncontroverted Affidavits attached as Exhibits A-K to the *Hayes* Motion for Summary Judgment and the Weman Affidavit attached as Exhibit J to the *Hayes* complaint. See also, discussion of the similarity between Article 34 (Proposition 10) and Article I § 26 (Proposition 14) in the Memorandum of Points and Authorities in *Hayes*, et al., pp. 15-17.

jects legislation which authorizes and encourages such discrimination.

The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the State government. Those practicing racial discrimination need no longer rely solely on their personal choices. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources. *Reitman v. Mulkey*, 387 U.S. 369, 377 (1967).

Article 34 also invites the voter to practice racial and ethnic discrimination in the polling place. This Court expressly stated in *Hunter v. Erickson*, *supra*, that such a scheme could not be constitutional:

Although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more that. Like the law requiring specification of candidates' race on the ballot, *Anderson v. Martin*, 375 U.S. 399 (1964), § 137 places special burdens on racial minorities within the governmental process. This is no more permissible than denying them the vote, on an equal basis with others *Hunter v. Erickson*, 393 U.S. at 391.

Ohio argued, as do the appellants here, in their Jurisdictional Statement at pp. 14-15, that because the special burden was imposed by the voters, the ordinance was immune from constitutional attack. This argument was rejected in *Hunter v. Erickson*, 393 U.S. at 392:

. . . [I]nsisting that a State may distribute legislative power as it desires and that the people may retain for themselves the power over certain subjects may gen-

erally be true, but these principles furnish no justification for a legislative structure which otherwise would violate the Fourteenth Amendment. Nor does the implementation of this change through popular referendum immunize it. [Citations omitted.] *The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed.* Even though Akron might have proceeded by majority vote at town meeting on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size (emphasis added)

"Here, as in the *Hunter* case, the 'special burden' of a referendum is not ordinarily required; here, as in the *Hunter* case, the impact of the law falls upon Minorities"⁴

4. Opinion below, at Appendix A, Appellants' Jurisdictional Statement, p. ix.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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Supreme Court Rules:	
Rule 16(4)	1

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 1557

RONALD JAMES, et al.,

Appellants,

vs.

ANITA VALTIERRA, et al.,

Appellees.

On Appeal From the United States District Court
Northern District of California

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO AFFIRM

INTRODUCTION

Appellants, Ronald James, Joseph Colla, Walter V. Hays, David J. Goglio, Kurt Gross and Norman Y. Mineta, respectfully file this memorandum in opposition to appellees' Motion to Affirm. This memorandum is filed pursuant to Rule 16(4) of the Supreme Court Rules.

These appellants have stated in their Jurisdictional Statement that the decision below is incorrect. In

summary fashion, the Jurisdictional Statement at page 15, says in part, "The case of *Hunter v. Erickson*, 393 U.S. 385 . . . is, nevertheless distinguishable, and should be distinguished, on its facts. The decision below is an overly broad application of the principles enunciated by the Supreme Court in *Hunter*, and is not justified by the decision in that case." It shall be the attempt of this memorandum to state briefly in what way *Hunter* is different from the instant case and why it should be distinguished.

ARGUMENT

Preliminarily, it should first be noted that at least one claim of appellees must be challenged at this time as incorrect. They have stated at page 7 of their Motion to Affirm, "Appellants have offered no legislative objective at all which requires the imposition of the referendum burden." Probably, the heart of appellants' attack upon the decision below involves this very point. Part of the appellants' assertion was made in their memorandum in support of their Motion to Dismiss, filed in the Court below. At page 3 of the memorandum, appellants listed several problems to be solved for the purpose of showing the local nature of the issues raised by a decision whether or not to have low-rent housing in a given community (planning, redevelopment, zoning, property tax revenues, school facilities, police protection, fire protection, streets, sewers and drains—not to mention bonded indebtedness limits, existing public housing, other capi-

tal needs). These very same legislative objectives or considerations, except for Article 34, would be the exclusive, justifiable and foremost considerations with which any local public entity would be faced while trying to decide the housing question. All Article 34 adds to change this situation is the requirement that such decision be shared with "a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire" the low-rent housing (Article 34, § 1). To the above-mentioned considerations, appellants have added the importance of, and the constitutional and legislative justification for, allowing qualified electors to share in the legislative process on such an issue (Jurisdictional Statement, p. 14).

Returning to the differences between *Hunter* and the case at hand, we find the Akron charter provision in *Hunter*, far more akin to the State Constitutional provision found in *Reitman v. Mulkey*, 387 U.S. 369 (1967), than it is to Article 34. The following are illustrative of this point:

1. Both the California Constitution in *Reitman* and the Akron charter provision in *Hunter* pertained expressly to discrimination on racial, religious or ancestral grounds. Article 34 pertains to none of these matters. Neither does it address itself to, nor permit discrimination, any more so than any other voting process;

2. *Hunter*, like *Reitman*, can be explained on the ground that the offensive legislation amounted to "state action" in that the Akron charter provision

would have lent official sanction to private discrimination. Article 34 does nothing more than to allow voters to do what the law would otherwise permit the local governing body to do alone;

3. Unlike the Akron charter provision in *Hunter*, and the State Constitution in *Reitman*, Article 34 repealed no valid existing law intended to prohibit discrimination;

4. Both the Akron charter provision in *Hunter* and the State Constitution in *Reitman*, dealt with limitations upon the governing bodies in question to pass legislation. Article 34 does not concern itself with legislation. Instead, it deals merely with the administrative decision to acquire or not to acquire public housing. Certainly, the legislative process of law-making is much more precious. Anything limiting or hampering that process deserves much more scrutiny than does a provision like Article 34 which deals only with a matter which is primarily of *fiscal* significance; and

5. In *Hunter*, the legislation dealt with by the Akron charter provision was of the type which the electorate could have reviewed at any time under the general referendum and initiative procedures (393 U.S. at 392-93). Article 34, on the other hand, was designed to fill a gap which the California Supreme Court created when it ruled that in Eureka, California, the City Charter did not permit referendum review of a decision to acquire public housing. As the Court said, the decision was "administrative" rather than "legislative", *Housing Authority v. Superior Court*, 35 Cal.2d 550, 219 Pac.2d 457 (1950), and the

Charter's referendum power was held to permit review only of the City's legislative decisions.

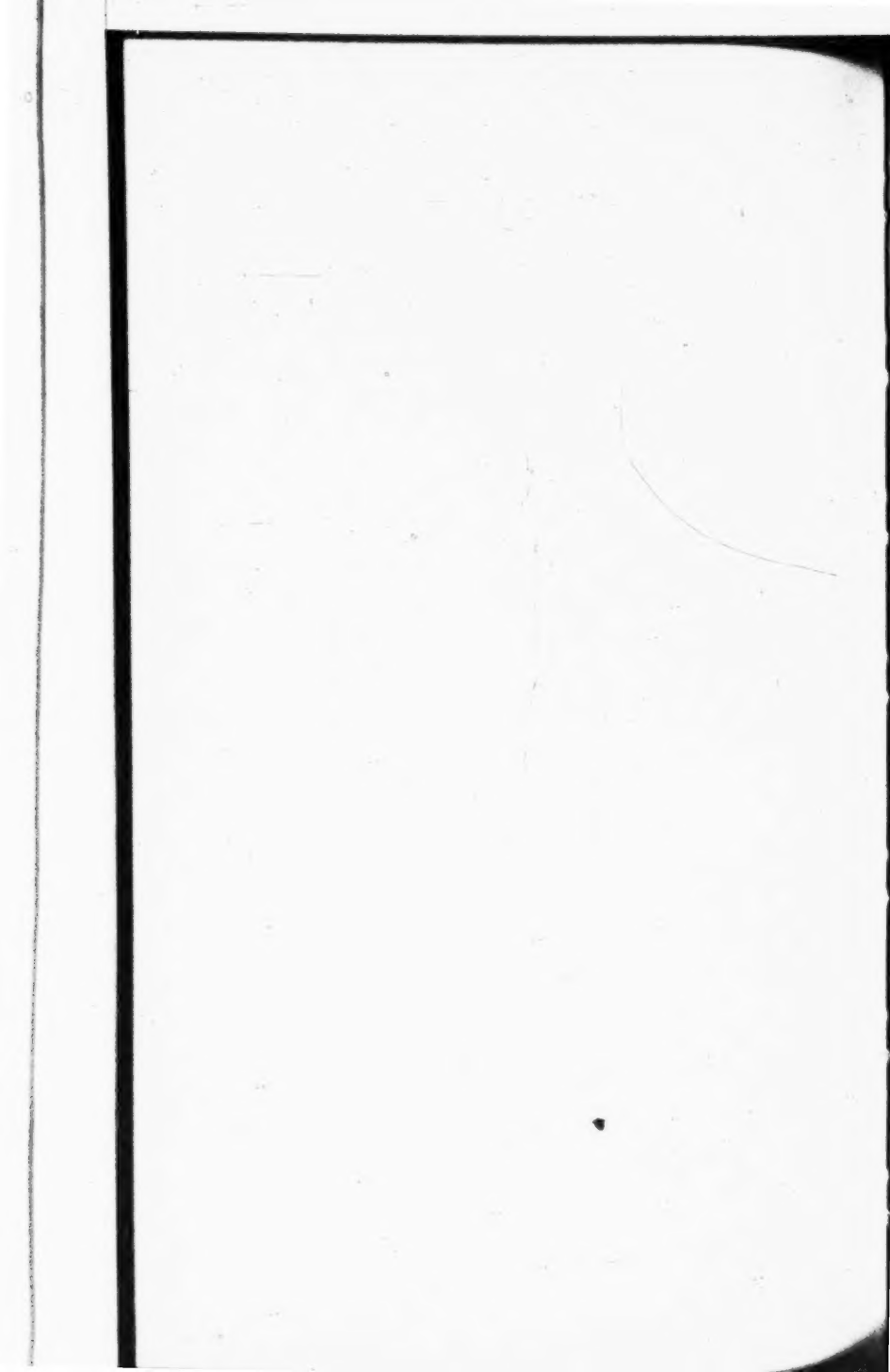
Hunter is the only case so far in which this Court has ruled that an "automatic" referendum requirement was unconstitutional. Given the facts and circumstances surrounding that case, the opinion is right and justified. But to allow the language of the *Hunter* opinion to be broadly applied as the District Court below and the appellees would have this Court do, would virtually strike down any and all such requirements anywhere and for any purpose. The result would remove the government, and its correlative responsiveness, one giant step further from the control and desires of its people.

CONCLUSION

Appellants respectfully submit that neither this Court nor the framers of the United States Constitution ever intended such a devastating infringement upon the right of the people to govern themselves. Article 34 is very similar in purpose and scope to bond elections, the validity of which have been upheld time and again. It is, therefore, respectfully requested that these appellants be given the full opportunity to deal with and to expand upon these most important issues in full, plenary fashion.

Dated, May 20, 1970.

Respectfully submitted,
DONALD C. ATKINSON,
Attorney for Appellants.



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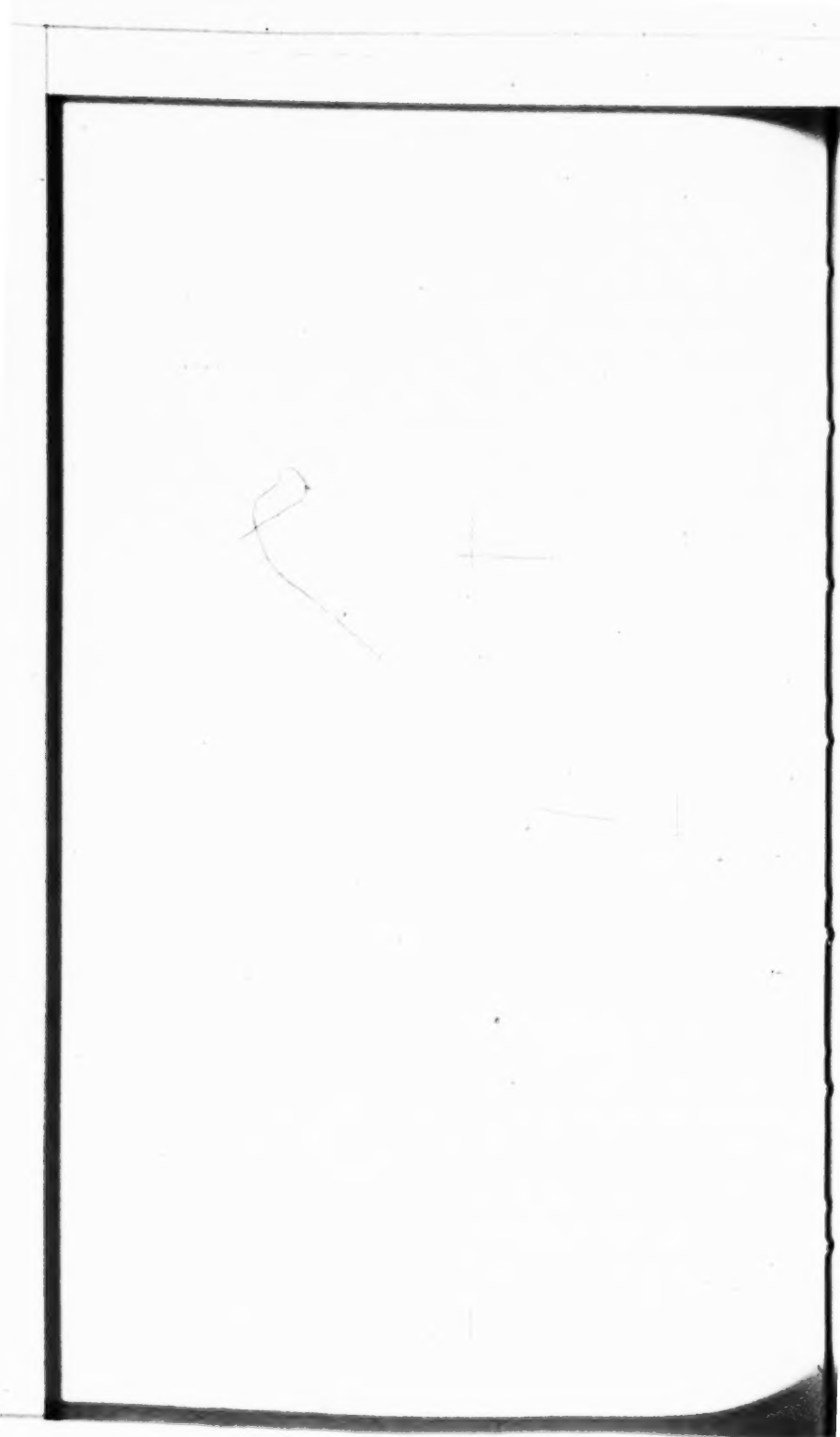
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In the Supreme Court

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OCTOBER TERM, 1970

No. 154

RONALD JAMES, et al.,

vs.

ANITA VALTIERRA, et al.,

Appellants,

Appellees.

On Appeal from the United States District Court
for the Northern District of California

APPELLANTS' BRIEF

OPINION BELOW

The Opinion of the District Court will be reported in 313 F.Supp. 1 sub. nom. *Valtierra v. Housing Authority of the City of San Jose, et al.*, and *Hayes v. Housing Authority of San Mateo*. It appears in the Appendix at 168-179.¹

¹By advice of the clerk, July 10, 1970, there is a consolidated Appendix for this case and *Shaffer v. Valtierra*, No. 226, October Term, 1970, the two cases being appeals by different defendants from the same judgment. Reference to the Appendix hereafter appears as "A".

JURISDICTION

This is a suit to enjoin enforcement of a provision of the Constitution of California—in the words of the complaint, “to invalidate Article XXXIV of the California Constitution” (Comp. Para. 1; A. 2). The jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331 and 1343, 42 U.S.C. § 1983, and the Equal Protection Clause of the 14th Amendment (Complt. Para 2; A. 2).² On April 2, 1970, a three-judge court, convened under 28 U.S.C. §§ 2281, 2284, entered summary judgment, comprising a declaratory judgment and permanent injunction (A. 178-9). The Notice of Appeal was filed April 10, 1970 in the District Court (A. 166).

This Court has jurisdiction under 28 U.S.C. § 1253, the appeal being from a permanent injunction by a three-judge court against enforcement of or obedience to a provision of a State Constitution. *Dandridge v. Williams*, 397 U.S. 471 (1970); *Florida Lime & Avocado Growers v. Jacobsen*, 362 U.S. 73 (1960); *A.F. of L. v. Watson*, 327 U.S. 582 (1946). This Court noted probable jurisdiction on June 29, 1970.

²Jurisdiction was also invoked under the Privileges and Immunities and Supremacy Clauses. The Court below found the “Supremacy argument unpersuasive” and did not reach the Privileges and Immunity Argument, as it “decides the case on Equal Protection grounds” (A. 172).

QUESTIONS PRESENTED BY THE APPEAL

The following questions are presented by this appeal:

(i) Does a state constitutional provision which limits the authority of a public body of such state to develop, construct or acquire low rent housing project for persons of low income without such entity first having obtained the approval of a majority of the qualified electors of the city, town or county, in which it is proposed to develop, construct, or acquire the same, voting on such issue at an election for that purpose, or at any general or special election, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution where the undisputed facts are that, with certain exceptions involving federally-owned housing, housing for public employees and housing for students at state universities and colleges, no other type of publicly-owned housing exists in such state?

(ii) Does a majority of the people of a state have the right to restrict the power of the local public bodies of such state to provide low rent housing to persons of low income of that state, where persons of low income form a "minority" of that state, but where there are in fact no public, middle or high rent projects in existence?

STATEMENT OF THE FACTS OF THE CASE

On November 7, 1950, the voters of the State of California at a general election approved an initiative measure, designated as Proposition 10, which added

Article XXXIV to the California Constitution. Earlier that same year, the California Supreme Court had ruled that referendums were not applicable to decisions to build public housing on the grounds that such decisions were mere administrative acts as opposed to legislative acts.³ The effect of the Constitutional Amendment was to nullify the decision for future situations where a state public body seeks to acquire public housing. It limited the authority of any state public body to develop, construct or acquire low rent housing without the prior approval of a majority of the qualified electors of the city, town or county in whose jurisdiction the proposed project is to be located, who vote on the issue.

By Resolution No. 28614, dated January 17, 1966, and adopted pursuant to the provisions of Section 34242 of the California Health and Safety Code, the Council of the City of San Jose found a need for low rent housing in its community. This resolution established the Housing Authority of the City of San Jose. Of the seven members then on the Council voting on the resolution, only two were members at the time this suit was filed in the District Court below, namely, Ronald James and Virginia C. Shaffer. Mayor James, then a Councilman, voted in favor of Resolution 28614, whereas Mrs. Shaffer voted against it. It was adopted by a vote of six to one.

Almost three years later, or on November 5, 1968, a special municipal election was held in San Jose as

³*Housing Authority v. Superior Court* (June 1950) 35 Cal. 2d 550, 219 Pac. 2d 457.

consolidated with the State of California general election. Measure B on the ballot was as follows:

"Shall the Housing Authority of the City of San Jose have authority to develop, construct, and acquire, in any manner selected by said Authority, a low rent housing project (as defined in Article XXXIV of the California Constitution), consisting of not more than one thousand dwelling units, subject to the following conditions: (1) not more than four such dwelling units shall be situate in any one structure, (2) not more than one structure containing any such dwelling unit shall be situate on any one lot, and (3) such dwelling units shall be dispersed among various sections of the City so that not more than twenty-four such dwelling units shall be situate within a radius of fifteen hundred feet from any other such dwelling unit."

The measure was defeated by a vote of 68,527 "against" to 57,896 "for" its approval.

It was the combination of the failure of this measure together with the requirements of Article XXXIV and the allegedly increased need for low rent housing units in San Jose which prompted the filing of the action below. Plaintiffs attempt to eliminate what they regard as an unfair obstacle in their path to obtain publicly-owned, low rent housing units for themselves and others of their class. The adult plaintiffs are mothers of the several respective minor plaintiffs. All are welfare recipients, residents of this City, and all live in over-crowded facilities. At least some of the facilities are also sub-standard from the standpoint of health and safety factors.

An uncontroverted affidavit submitted by plaintiffs in support of their Motion for Summary Judgment showed that whereas in November, 1969 the City and the County Housing Authorities leased a total of 1,933 units for sublease at low rent, nevertheless, there was then an immediate need for 1,853 additional units. Whereas, none of the Appellants has admitted in Court that there is a current need for low rent housing units in the City of San Jose, nevertheless none of them has offered any evidence to refute the claim. And for purposes of this Appeal at least, current need is an established fact.

In opposition, however, to the Motion for Summary Judgment below, Appellants prepared a stipulation of fact, entered into by the attorneys for the Appellees which sets forth the types of publicly-owned or leased housing in the State of California. This stipulation established as uncontroverted fact that except for federally-owned housing, housing for certain State employees, housing for college and university students, and housing acquired to clear the way for public projects such as highways, airports, streets, etc., no other type of housing is owned or leased by any state public body of the State of California for residential purposes other than housing for rental to persons of low income, as such persons are defined by Article XXXIV. In other words, with the above exceptions, there is no State, City or County owned or leased housing for rental to persons of middle or high incomes in California.

Also established as uncontroverted fact by plaintiffs' own affidavits, and as already noted above, Appellants, or rather the Housing Authority established by them, have acquired by lease existing housing units in the City of San Jose, for subleasing to persons of low income in this City. Such acquisition by the Housing Authority has never been submitted to the electors of this City for their approval. The reason for this is that the Attorney General of the State of California has rendered an opinion that such type of acquisition does not fall within the requirements of Article XXXIV. (47 Ops. Cal. Atty. Gen. 17, issued January 18, 1966 as Opinion No. 65-246.)

The validity of Section 1 of Article XXXIV of the California Constitution is here involved. The full text of that article is as follows:

"§ 1. Approval of electors; definitions

Section 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

"For the purposes of this article the term 'low rent housing project' shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the

Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. For the purposes of this article only there shall be excluded from the term 'low rent housing project' any such project where there shall be in existence on the effective date hereof, a contract for financial assistance between any state public body and the Federal Government in respect to such project.

"For the purposes of this article only 'persons of low income' shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

"For the purposes of this article the term 'state public body' shall mean this State, or any city, city and county, county, district, authority, agency, or any other subdivision or public body of this State.

"For the purposes of this article the term 'Federal Government' shall mean the United States of America, or any agency or instrumentality, corporate or otherwise, of the United States of America. (Added Nov. 7, 1950.)

"§ 2. *Self-executing provisions*

Sec. 2. The provisions of this article shall be self-executing but legislation not in conflict herewith may be enacted to facilitate its operation. (Added Nov. 7, 1950.)

"§ 3. *Partial validity*

Sec. 3. If any portion, section or clause of this article, or the application thereof to any person or circumstance, shall for any reason be declared unconstitutional or held invalid, the remainder of this article, or the application of such portion, section or clause to other persons or circumstances, shall not be affected thereby. (Added Nov. 7, 1950.)

"§ 4. *Conflicting provisions superseded*

Sec. 4. The provisions of this article shall supersede all provisions of this Constitution and laws enacted thereunder in conflict therewith. (Added Nov. 7, 1950.)"

ARGUMENT

(1) THE DECISION BELOW INCORRECTLY APPLIES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION.

It has been said, and Appellants submit correctly so, that all laws discriminate in some manner or other against one class of persons in favor of another, *Hill v. Rae*, 158 Pac. 826 (Mont. 1916). It is clearly the law that such classification must have a reasonable relationship to the purpose for which it is made, *Smith v. Cahoon*, 283 U.S. 553 (1931). The five rules for testing the existence of illegal discrimination were set forth in full by this Court in 1957 when it said,

"1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope

of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore, is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.'” (Citations omitted.)

“To these rules we add the caution that ‘Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.’”

Morey v. Doud, 354 U.S. 457, at 463-464 (1957).

Inherent in all of this is the proposition that this Court will not stretch its tests in order to find an unreasonable classification. To cite an example, a state statute drawn for the purpose of licensing and regulating businesses dealing with currency exchanges may be struck down as unconstitutional for the manner in which it treats some of those businesses as opposed to others, but *not* merely because it fails to license and regulate *all* businesses in the state. It is even true that the Equal Protection Clause does not require that every state regulatory statute apply to

all in the same business, *Morey v. Doud* (supra, at 465). When a class is established or singled out by a state law, the concern of the Court is in seeing to it that the tests set forth in *Morey v. Doud* (supra) are met.

Article XXXIV, by its express terms, applies *only* to a "low-rent housing project . . . developed, constructed, or acquired in any manner by any state public body." Appellants submit that the tests of constitutionality under the Equal Protection Clause are met *if* California's treatment of low-rent housing projects is justified in view of California's treatment of "mid" rent or "high" rent housing projects "developed, constructed or acquired in any manner by any state public body." Such is *not* the test, however, applied by the District Court below. The Court below ignores and disregards a stipulation of fact entered into by the Appellants and the Appellees which establishes, with certain noted exceptions, that California has *no* other type of "public" housing except "low-rent housing". Instead, the Court below insists upon comparing California's treatment of low-rent housing projects with its treatment of "all (other) projects", citing as some "common examples": "highways, urban renewal, hospitals, colleges and universities, secondary schools, law enforcement assistance, and model cities". (A. 177) Appellants submit that a test such as that used below is the equivalent of testing the licensing and regulatory provisions examined in *Morey v. Doud* (supra) with licensing and regulatory provisions for *all* businesses conducted within the State.

The test applied below makes it impossible to determine what class of persons are treated differently from those expected to benefit from low-rent housing projects. We cannot believe that the Court below was attempting to protect "state agencies" acting on behalf of the poor and the minorities as against "state agencies" acting on behalf of other groups seeking financial Federal assistance. The Fourteenth Amendment does not protect state agencies, *Williams v. Baltimore*, 289 U.S. 36 (1932); *State of Wisconsin v. Zimmerman*, 205 F. Supp. 673 (1962). Yet, according to the opinion, this is precisely what the Court below was attempting to do. (A. 176).

If the Court below was concerned about protecting the poor, as Appellants believe was intended, then how does Article XXXIV's classification become invidious merely because other projects requiring Federal assistance can be developed, constructed or acquired without need for referendum vote? Certainly, the poor benefit from the other projects mentioned by the Court, if not merely as much as, then even more so than do other economic classes. Therefore, it can hardly be argued that the "poor" are discriminated against on that ground.

Secondly, if low rent housing of the type contemplated by Article XXXIV is the only type of public housing which exists in California (A. 69, 70), then there is *no* unequal treatment of the poor merely because the middle class or the wealthy could *theoretically* acquire public housing for their own benefit without a referendum vote. Furthermore, the question

of whether or not Article XXXIV would be constitutional *if or when* California does have mid-income or high-income public housing is a hypothetical question and should *not* be decided at this time, *U.S. v. Raines*, 362 U.S. 17 (1960); *Allen-Bradley Local, U.E.R.M.W. v. Wisconsin Employment Relations Board*, 315 U.S. 740 (1942). As a matter of fact, there is *no* legal authority for acquisition of any type of public housing in California other than that defined by Article XXXIV.

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- (ii) **THE JUSTIFICATION FOR THE SINGLING OUT OF LOW-RENT HOUSING PROJECTS FOR REFERENDUM TREATMENT IS REASONABLE, AND SUCH TREATMENT BEARS A REASONABLE RELATIONSHIP TO THE PURPOSE FOR WHICH ARTICLE XXXIV WAS FRAMED.**

Article XXXIV was born following the November 7, 1950, general elections in California when Proposition 10 on the state ballot, added by successful state initiative, received a favorable majority vote. (A. 48-54) Just prior to this election, or in June, 1950, the California Supreme Court had held that the acts of a local governing body and housing authority under the Housing Authorities Act of California relative to applications to the Federal housing authority were "executive and administrative", not "legislative", and therefore not reached by the power of referendum, *Housing Authority v. Superior Court*, 219 P.2d 457 (Calif. 1950). Thus, contrary to the circumstances existing in Akron, Ohio, at the time that City's Charter was amended, *Hunter v. Erickson*, 393 U.S. 385, 390 and 392 (ftn. 7) (1969), electors in Cali-

fornia would have no means of disapproving of the acquisition of public housing except (1) as happened, by adding Article XXXIV to the state constitution, or (2) by repealing the Housing Authorities Act of California. Appellants submit that by choosing the former remedy, the voters acted in much the more reasonable and justifiable manner. Article XXXIV leaves open the *authority* for a local entity to acquire housing. It merely conditions that authority by requiring majority approval of the local entity's electorate voting on the issue.

Any housing development proposal, either public or private, presents or creates problems regarding the provision and administration of governmental services which can only be solved at the local level. However, *public* housing projects create fiscal problems which are nonexistent when the same project is owned, operated and maintained by *private* interests. Some of the problems created by both public and private housing developments stem from the need to provide such new residents with adequate police and fire protection, public school facilities, public transportation, and most particularly of late, sewage disposal facilities designed to meet the higher, anti-pollution requirements of recent Federal and State legislation.⁴ Public housing projects involve, in addition, considerations such as the amount of contribution required of the local entity and the ability of the local entity to finance any portion of any loan commitment which may be imposed upon the local

⁴32 Law And Contemp. Prob. 490 at 509 (1967).

entity under either the Federal or the State housing assistance program. Also to be considered are the means available, if any, for receiving revenue from the project which would replace the property taxes which no longer would be collectable from the property on which the project is situated. Such revenues should be adequate to pay a proportionate share of the costs of the several services and overhead expenses of the local entity involved with respect to the project. It must also be remembered that, although at any given time in the future one hundred per cent Federal assistance may exist, nevertheless, such assistance will always be subject entirely to the availability of funds. An enabling act without an appropriation act is virtually worthless. And since appropriations can increase, decrease or cease entirely upon the whim or discretion of Congress, potential liability to provide the "underwriting" costs of such a project is of *no* small concern to the local government either.⁵

There are several alternatives to the public housing program in existence today.⁶ These provide the local government and its electorate with a choice of the best method of solving any local housing shortage which may exist in the community. Private development in conjunction with an urban redevelopment program is one way. Private development of low-

⁵32 Law And Contemp. Prob. 490 at 509 (1967).

⁶For excellent discussions of the several social and economic problems raised by, and for a discussion of alternatives to Public Housing projects, see: 81 Harv. L. Rev. 1295 (1968); 116 U. Pa. L. Rev. 611 (1968); and 76 Yale L.J. 508 (1967).

rent housing by non-profit groups such as churches and unions is another. Then, there is the lease method of acquisition which has been widely used by cities and counties in California. This method uses existing units built and owned by private interests. Each of the various methods has certain advantages and disadvantages. But to make a claim that outright public ownership is the only satisfactory solution to providing low-rent housing is simply an untenable position.

We submit that these factors justify the concern and desire of the local voters to be involved and consulted in any decision to acquire a public housing project in their community. *Dandridge v. Williams*, 397 U.S. 471 (1970).

One fact should be evident to any person faced with the question of whether or not his community should have publicly-owned low-rent housing. That fact is simply that the question is one primarily of a *political* and *fiscal* nature. It is in the same nature as questions raised by bond elections. The point is, the question is *not* whether we should treat "A" differently from "B" by giving A's class public housing, while we deprive B's class of public housing. There is only *one* "class" which receives the benefit of *public* housing in California, and so the question asked by an Article XXXIV referendum is simply whether or not to provide public housing at all.

Appellees have argued, and the District Court has agreed with the point (A. 174), that the referendum requirement of Article XXXIV is a special burden

upon the poor. Accepting that label or description of the referendum process as accurate for the sake of argument only, nevertheless, such fact does not thereby place Article XXXIV at odds with the protection offered by the Equal Protection Clause. It has long been the accepted principle of this Court that special burdens are often necessary for general benefits. *Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.* *Barbier v. Connolly*, 113 U.S. 27 at 31-32 (1885); *Atchison T. & S.F. Ry. Co. v. Matthews*, 174 U.S. 96 at 103-107 (1899); *Mountain Timber Co. v. Washington*, 243 U.S. 219 at 243-46 (1917); *Truax v. Corrigan*, 257 U.S. 312 (1921); *Douglas v. California*, 372 U.S. 353 (1963). Federal and State legislation confers or enables the privilege of public housing. When that very legislation leaves it up to the decision of the local community, and Article XXXIV merely prescribes the procedure for making that local decision,⁷ it does not follow that Article XXXIV treats one class differently from another. On the contrary, *Article XXXIV, within the sphere of its operation, affects alike all persons similarly situated.* If the poor want the affluent to provide them with housing, it would seem only reasonable that they should expect and be willing to accept the "burden" of receiving the willing con-

⁷42 U.S.C. §§ 1401, 1402 (11), 1409, 1410, 1411 and 1415 (7).

sent of a simple majority of those persons who are expected to help pay for that housing and its correlative needs. According to Appellee's own evidence, a majority of those persons voted "yes" to such projects in 70% of the elections conducted during the ten year period from 1958 through 1967. (A. 35-37) Such a showing is hardly justification for the invalidation of a state constitutional measure calling for a referendum, even if the results were less successful.

The District Court below found no merit in plaintiffs' Supremacy Clause argument. (A. 172). There simply is no compelling Federal policy or law which dictates to or places mandatory duties upon local governmental agencies (or their voters) relative to the Federal public housing program. The process of deciding political issues at the state or local level by referendum has been expressly approved by this Court as early as 1915, *Ohio v. Hildebrand*, 241 U.S. 565 (1916). What Appellants urge is that, as long as local legislative bodies *do* have discretionary powers, *Morey v. Doud* (supra); *DayBrite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1951); *Sproles v. Binford*, 286 U.S. 374 (1932), and to the extent they so do, this discretion can be limited or shared by the more supreme power, the power of the people themselves acting within, and in concert with, their Constitutional rights, *Cochran v. Louisiana State Bd. of Education*, 281 U.S. 370 (1930).

(iii) **THE CASE OF HUNTER v. ERICKSON, RELIED UPON BELOW, IS DISTINGUISHABLE FROM THE CASE AT BAR.**

As already stated above (p. 13), in *Hunter*, the legislation dealt with by the Akron Charter provision was of the type which the electorate could have reviewed at any time under the general referendum and initiative procedures (393 U.S. 392-93). By reason of California Supreme Court decision, however, the decision to apply for Federal financing, or simply to acquire public housing, is not a decision which can be reached by referendum. Thus, only by means of amendment to the State Constitution (which defines the referendum power reserved to the California electorate) could that electorate participate at the local level in the administrative (and political) decision to acquire public housing.

The Akron Charter provision also differed from Article XXXIV in that the Charter provision was a limitation upon the authority of the City Council to adopt *legislation*. Article XXXIV does not concern itself with legislation. Article XXXIV deals merely with an administrative, fiscal and political decision to acquire or not to acquire public housing. It is precisely the type of question with which this Court has in the past refused to become involved, *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937); *State of Ohio ex rel. Bryant v. Akron Metropolitan Park Dist.*, 281 U.S. 74 (1930); *Hughes v. Superior Court*, 339 U.S. 460, 466-67 (1950). Legislative process is, on the other hand, a more delicate and crucial matter, the interference with or restriction of which

might well deserve more careful scrutiny by the Courts. In that sense, this Court's concern in *Hunter* can be explained. However, in the case at bar, it is only the *method* (i.e., the referendum) by which the local governmental entity is compelled to arrive at its own decision which Appellees challenge. And in this latter sense, the concern of this Court as enunciated in *Hunter* does not and should not apply.

Again, unlike the Akron Charter provision in *Hunter*, Article XXXIV repealed no valid existing law intended to prohibit discrimination. Appellants realize that it was not crucial to this Court's decision in *Hunter* that the Akron Charter Amendment did repeal existing legislation intended to prohibit racial discrimination. (393 U.S. at 390, ftn. 5). Nevertheless, it seems obvious enough to Appellants that such attempts at the local level to thwart anti-discrimination efforts are not looked upon by this Court with great favor, *Reitman v. Mulkey*, 387 U.S. 369 (1967). But whether or not the mere repeal of an existing ordinance can violate the Fourteenth Amendment, Article XXXIV does *not* do so. Article XXXIV merely conditions the authority of the local or State legislature to acquire public housing. The condition is that the legislature first seek approval of a majority of the electors voting on the issue in the community where the project is to be located.

Again, unlike the city charter provision in *Hunter*, Article XXXIV does *not* address itself to discrimination, either racial, economic or otherwise. Its subject matter is strictly low-rent housing projects. It does

not permit or condone discrimination any more so than does any other voting process.

To strike down Article XXXIV merely because it might allow a majority of voters to deny housing for the poor would be to undermine the very heart of the democratic system itself. Such a decision would necessarily weaken a state's right to present *any* social issue to the voters for decision. Appellants do *not* claim that the "majority" may discriminate against the "minority". Nor do Appellants claim that a popular referendum immunizes the result from judicial review. But it is the claim of Appellants that *an electorate has the right to demand in advance that any given issue, other than those already decided by the U.S. Constitution, be decided at the polls rather than by elected representatives.*⁸ "The power to enact laws and control public servants lies with the great body of the people." *Pacific States T. & T. Co. v. Oregon*, 223 U.S. 118 at 145 (1912); *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 at 374 (1930). In an age when the popular cry of the "minorities" is "Power to the People", it seems ironic that it should now be Appellants, elected city officials, often commonly referred to as "the establishment", who are now called upon to defend that "power" against the attack of those claiming to be in the minority, *Reynolds v. Sims*, 377 U.S. 533 (1964); *Harper v. Virginia Board of Elections*, 383 U.S. 633 (1966). For what lawful power does any citizen have over his government other than that which he exercises at the polls?

⁸Ninth and Tenth Amendments to U. S. Constitution.

Appellants submit that the type of provision contained in the Akron Charter in *Hunter* amounted to "state action" to sanction private racial discrimination. Appellants realize that the state action theory was not used in *Hunter* in arriving at this Court's opinion. Perhaps one reason was that, unlike laws in other cases where this theory was used (*Reitman v. Mulkey*, 387 U.S. 369, for example) the Akron Charter provision referred *specifically* to racial and religious discrimination laws. Thus, the evil of the challenged provision was not merely that it encouraged or sanctioned private discrimination (as it did) but that it amounted to unfair discrimination in and of itself. Actually, however, looking at the ultimate effect of the Akron Charter, its evil of sanctioning or encouraging private racial discrimination is considerably more serious than the "vice" of making it more difficult for one group to obtain legislation than another group.

But unlike *Hunter*, the challenged provision in this case has nothing whatever to do with racial or religious discrimination. The "discrimination" of Article XXXIV is the same as that inherent in *any* law dealing in relief of social problems. It singles out a particular form of social benefit, and deals exclusively with that subject alone. So too, does other social benefit legislation. It provides the procedure whereby such benefit may be extended. The procedure involves simple majority approval of the proposal in the community where it is to be placed. Such requirement is no more inherently discriminatory than is any law

requiring voter approval. It has been said time and again that the referendum procedure is neutral, *Ran-jel v. City of Lansing*, 417 F.2d 321 (6th Cir. 1969), cert. den. 397 U.S. 980 (1970); *Spaulding v. Blair*, 403 F.2d 862 (4th Cir. 1968). This being so, a law which requires a referendum to decide an issue can hardly be said to be less neutral.

SUMMARY ARGUMENT

In brief summation, this case involves the validity of a method used by California, for making a political decision with respect to the State's participation in the Federal program to provide public housing. We do not make the claim that Article XXXIV best fulfills the relevant social and economic objectives of California or of the Federal government. We do claim that the decision below is an attempt to solve by judicial process the "intractable economic, social, and even philosophical problems presented by public welfare assistance programs", *Dandridge v. Williams*, 397 U.S. 471 (1970), whereas such is not the business of this Court, *Ferguson v. Skrupa*, 372 U.S. 726 (1963). Congress has approved of this method of making such decision. We submit that the decision of Congress in this case falls within its Article IV, Section 4 power and that such decision is one solely for Congress to determine. *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 at 567-68 (1916).

CONCLUSION

Appellants submit (1) that the Court below applied an incorrect test to determine whether the equal protection clause of the Fourteenth Amendment of the Federal Constitution had been violated; (2) that there is a reasonable justification for singling out Low-Rent Housing Projects for referendum treatment and that such treatment bears a reasonable relationship to the purpose for which Article XXXIV was framed; (3) that the case of *Hunter v. Erickson*, heavily relied on by the Court below is distinguishable from the case at bar. The Court below should have granted Appellants' Motion to Dismiss. Appellants therefore respectfully urge a reversal of the decision below.

Dated, San Jose, California,
September 3, 1970.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 226

VIRGINIA C. SHAFFER,

Appellant,

vs.

ANITA VALTIERRA, et al.

On Appeal from the United States District Court
for the Northern District of California

Brief of Appellant Virginia C. Shaffer

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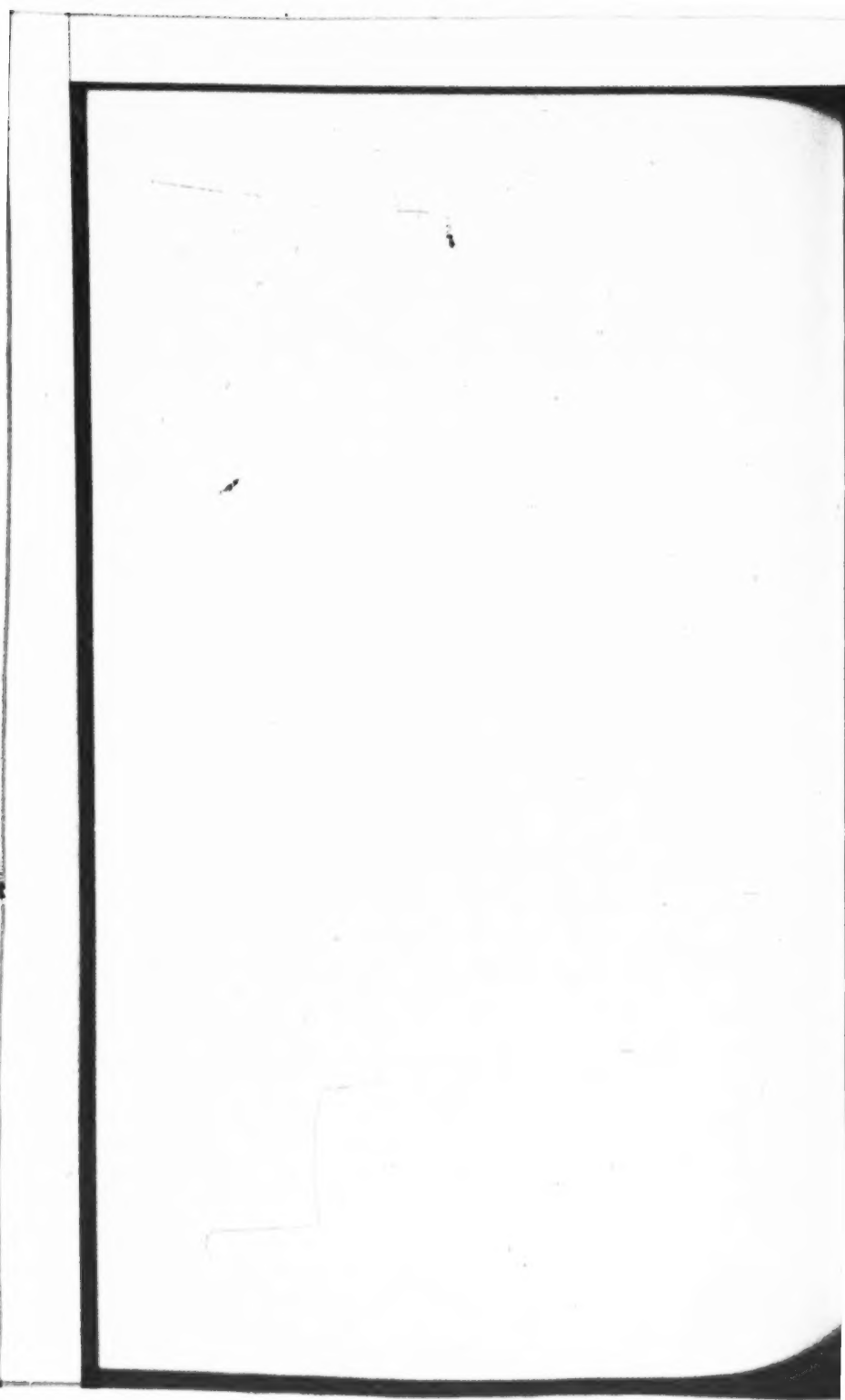
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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 226

VIRGINIA C. SHAFFER,

Appellant,

VS.

ANITA VALTIERRA, et al.

On Appeal from the United States District Court
for the Northern District of California

Brief of Appellant Virginia C. Shaffer

OPINION BELOW

The Opinion of the District Court will be reported in 313 F.Supp. 1 *sub. nom. Valtierra v. Housing Authority of the City of San Jose*, et al., and *Hayes v. Housing Authority of San Mateo*. It appears in the Appendix at 168-179.¹

JURISDICTION

This is a suit to enjoin enforcement of a provision of the Constitution of California—in the words of the complaint, “to invali-

1. By advice of the clerk, July 10, 1970, there is a consolidated Appendix for this case and *James v. Valtierra*, No. 154, Oct. Term, 1970, the two cases being appeals by different defendants from the same judgment. Reference to the Appendix hereafter appears as “A.”

All emphasis in quotations in this brief has been added unless otherwise stated.

date Article 34 of the California Constitution" (Comp. ¶ 1; A.2). The jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331 and 1343, 42 U.S.C. § 1983, and the Equal Protection clause of the 14th Amendment (Complt. ¶ 2; A. 2).³ On April 2, 1970, a three-judge court, convened under 28 U.S.C. §§ 2281, 2284, entered summary judgment, comprising a declaratory judgment and permanent injunction (A. 178-9). The Notice of Appeal was filed April 10, 1970 in the District Court (A. 166).

This Court has jurisdiction under 28 U.S.C. § 1253, the appeal being from a permanent injunction by a three-judge court against enforcement of or obedience to a provision of a State Constitution. *Dandridge v. Williams*, 397 U.S. 471 (1970); *Florida Lime & Avocado Growers v. Jacobsen*, 362 U.S. 73 (1960); *A.F. of L. v. Watson*, 327 U.S. 582 (1946). This Court noted probable jurisdiction on June 29, 1970.

CONSTITUTIONAL PROVISIONS INVOLVED

14th Amendment, Constitution of the United States:

"* * * nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws."

Article XXXIV of the Constitution of California (Cal. Stats. 1951 cxxiv):

"SECTION 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

2. Jurisdiction was also invoked under the Privileges and Immunities and Supremacy Clauses. The court below found the "Supremacy argument unpersuasive" and did not reach the Privileges and Immunity Argument, as it "decides the case on Equal Protection grounds" (A. 172).

"For the purpose of this article the term 'low rent housing project' shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. For the purposes of this article only there shall be excluded from the term 'low rent housing project' any such project where there shall be in existence on the effective date hereof, a contract for financial assistance between any state public body and the Federal Government in respect to such project.

"For the purposes of this article only 'persons of low income' shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

"For the purposes of this article the term 'state public body' shall mean this State, or any city, city and county, county, district, authority, agency, or any other subdivision or public body of this State.

"For the purposes of this article the term 'Federal Government' shall mean the United States of America, or any agency or instrumentality, corporate or otherwise, of the United States of America.

"SEC. 2. The provisions of this article shall be self-executing but legislation not in conflict herewith may be enacted to facilitate its operation.

"SEC. 3. If any portion, section or clause of this article, or the application thereof to any person or circumstance, shall for any reason be declared unconstitutional or held invalid, the remainder of this article, or the application of such portion, section or clause to other persons or circumstances, shall not be affected thereby.

"SEC. 4. The provisions of this article shall supersede all provisions of this Constitution and laws enacted thereunder in conflict therewith."

STATUTES INVOLVED

28 U.S.C. § 1253:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

28 U.S.C. § 1343:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

28 U.S.C. § 2281:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

QUESTIONS PRESENTED

1. Where a State provides no manner of public housing except low rent housing for persons of low income, does the State Constitution violate the equal protection clause of the 14th Amendment, merely because it provides that no low-rent housing

project shall be developed, constructed or acquired by any state public body unless the project has been approved by a majority of the voters in the locality of the project?

2. Should the issue have been decided on summary judgment, particularly where plaintiffs' standing to sue is, at best, dubious, and the case below was essentially a feigned case?

The first question is, verbatim, the question expressed in our Jurisdictional Statement. The second question is fairly comprised therein within the meaning of this Court's Rule 40(d)(1). The Jurisdictional Statement emphasized that appellant Shaffer obtained separate counsel to come before this Court, after the appeal was taken, in the belief that the other appellants from the same judgment (the appellants in No. 154) were utilizing the appeal to obtain this Court's affirmance of the judgment, not its reversal,³ and that the case had been decided on summary judgment upon the basis of the sketchiest record (Juris. Stat. pp. 12, 19).⁴

STATEMENT OF THE CASE

1. The genesis of Article XXXIV of the California Constitution

"The United States Housing Act of 1937 (42 U.S.C.A. §§ 1401-1430)^[5] established a federal housing agency authorized to make loans to state agencies for the purpose of slum clearance and low-rent housing projects. The California Legislature made the benefits of the federal act available to the cities and counties of this state by enacting the Housing Authorities Law * * *.

"The legislation created in each city and county a public housing authority * * *. The exercise of the powers entrusted by the

3. Our Jurisdictional Statement, p. 2., contains a statement of which part 8 at pages 15, 16, *infra*, is substantially a copy.

4. For example, at p. 19: "This kind of argument illustrates the vice of a summary judgment. *If* questions like these are relevant at all to the issue in the case, there should be a plenary trial in which a complete and factual basis for a constitutional determination can be made." [Italics in original]

5. Act of Sept. 1, 1937, c. 896, 50 Stat. 888, as amended.

Legislature to these agencies was made subject to the preliminary condition that the local governing body, in each case, must formally resolve that public housing is needed."⁶

On November 7, 1950, the People of the State of California at a general election added Article XXXIV to the State Constitution, providing that no low-rent housing project shall proceed without prior approval by the voters of the locality. *What occasioned its adoption was the discovery of a gap in California in the referendum system.* The initiative and referendum are integral parts of the distribution of sovereignty in California. Article IV, Sec. 1, of the California Constitution, on the Legislative Department, vested legislative power and added

"but the people reserve to themselves the power to propose laws or amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature, and also reserve the power, at their own option, to so adopt or reject any Act, or section or part of any Act, passed by the Legislature."

The same section itself provides the machinery and also provides that

"The initiative and referendum powers of the people are hereby further reserved to the electors of each county, city and county, city and town of the State to be exercised under such procedure as may be provided by law."⁷

Section 1603 of the Charter of the City of San Jose provides for referenda generally.

But in June 1950 the Supreme Court of California held that the acts of a local governing body and housing authority under the Housing Authorities Act of California relative to applications to the federal housing authority were "executive and administrative," not

6. The foregoing is quoted from *Housing Authority v. Superior Court*, 35 Cal. 2d 550, 552-53, 219 P.2d 457, 458 (1950).

7. The language of the foregoing provisions was simplified in 1966 but without change of substance.

"legislative", and therefore not reached by the power of referendum. *Housing Authority v. Superior Court*, 35 Cal. 2d 550, 219 P.2d 457 (1950). It was in *immediate* response to this decision that Article XXXIV was adopted by the electorate less than 6 months later. To the mind of the electorate Article XXXIV was not new but a reaffirmance of a policy going back for years.

2. The propriety and reasonableness of the requirement of Article XXXIV was immediately recognized by Congress

The propriety and reasonableness of a requirement that there be no low rent public housing unless first approved by the electorate so appealed to the Congress of the United States that it almost immediately made it nationwide by the Independent Offices Appropriations Act the year after Article XXXIV was adopted in California. The Act of August 31, 1951, c. 376, Title I, 65 Stat. 277 provided:

"Provided further, That the Public Housing Administration shall not, after the date of approval of this Act, authorize the construction of any projects initiated before or after March 1, 1949, in any locality in which such projects have been or may hereafter be rejected by the governing body of the locality or by public vote, unless such projects have been subsequently approved by the same procedure through which such rejection was expressed."

The next year Congress repeated the prohibition, in exactly the same language, in the Act of July 5, 1952, c. 578, Title I, 66 Stat. 403. The following year Congress reasserted the policy in the First Independent Offices Appropriation Act of 1954 (Act of July 31, 1953, c. 302, Title I, 67 Stat. 306), thus:

"Provided further, That unless the governing body of the locality agrees to its completion, no housing shall be authorized by the Public Housing Administration, or, if under construction continue to be constructed, in any community where the people of that community, by their duly elected representatives, or by referendum, have indicated

they do not want it, and such community shall negotiate with the Federal Government for the completion of such housing, or its abandonment, in whole or in part, and shall agree to repay to the Government the moneys expended prior to the vote or other formal action whereby the community rejected such housing project for any such projects not to be completed plus such amount as may be required to pay all costs and liquidate all obligations lawfully incurred by the local housing authority prior to such rejection in connection with any project not to be completed."

3. The basis on which Article XXXIV was submitted to the People of California and adopted by them

The California Constitution (former Art. IV, § 1, ¶ 11) required the Secretary of State before any election to prepare an official pamphlet and distribute it to every voter, containing arguments for and against every proposition to be voted upon. A copy of that portion of the 1950 Ballot pamphlet relating to Proposition 10, which became Article XXXIV of the State Constitution, appears at A. 49-54.

The Argument in Favor of Initiative Proposition No. 10 contained no appeal to racial prejudice and nothing against public housing; it was an appeal to "grass roots democracy" and "strong local self-government." In full, it reads thus:

"A 'YES' vote for this proposed constitutional amendment is a vote neither for nor against public housing. It is a vote for the future right to say 'yes' or 'no' when the community considers a public housing project.

"Passage of the 'Public Housing Projects Law' will restore to the citizens of a city, town, or county, as the case may be, the right to decide whether public housing is needed or wanted in each particular locality. Such is not the case at present.

"Time after time within the past year California communities have had public housing projects forced upon them without regard either to the wishes of the citizens or community needs. This is a particularly critical matter in view

of the fact that the long-term, multimillion-dollar public housing contracts call for tax waivers and other forms of local assistance, which the Federal Government says will amount to HALF the cost of the federal subsidy on the project as long as it exists.

"For government to force such additional hidden expense on the voters at a time when taxation and the cost of living have reached an extreme high is a 'gift' of debatable value. It should be accepted or rejected by ballot.

"If, on the other hand, certain communities are in such dire need of housing that the cost of long-term subsidization is deemed worth while, local voters, who best know that need, should have the right to express their wishes by ballot.

"In either case, a 'YES' vote for this proposed amendment will strengthen local self-government and restore to the community the right to determine its own future course.

"Furthermore, the financing of public housing projects is an adaptation of the principle of the issuance of revenue bonds. Under California law, revenue bonds, which bind a community to many years of debt, cannot be issued without local approval given by ballot. Public housing and its long years of hidden debt should also be submitted to the voters to give them the right to decide whether the need for public housing is worth the cost.

"A 'YES' vote for the 'Public Housing Projects Law' is a vote for strong local self-government. It is an expression of confidence in the community's future and in the democratic process of government. To strengthen the grass roots democracy which has made America protector of the world's free peoples, vote 'YES' on the Public Housing Projects Law."

The principal literature distributed to the electorate by the proponents of Proposition 10, a Facts Booklet, contained these statements:

"Why Is Proposition 10 Needed?

There is a vital reason for this Proposition!

Our California Constitution, until now, has protected the

taxpayers against huge long-term debt without prior approval of the voters. But Public Housing projects have been able to avoid this voting requirement through a technicality.

In effect, it provides for determination on the level of the voter of matters vitally affecting tax rates and home rentals, for in each instance of public housing development, taxable property is removed from taxation, and the burden of paying for fire, police, street, sewer, school and other public expenses for these projects must be passed on to the other taxpayers—who, in the case of landlords, will in turn pass them on to tenants.

* * *

Proposition 10 Fits the American Tradition That Voters Should Approve Projects Involving Long-Term Public Debt

Local citizens in America have traditionally enjoyed the right of decision in the case of community projects such as schools, transit systems, highway developments, public buildings, water districts and others involving long-term public debt. But the California Housing Act, through its wording, removed that right in the case of public housing, which involves the same considerations of cost and taxation.

Proposition 10 is intended to remedy that oversight in the law, and restore the right of decision to the voters.

It should be particularly noted that the amendment does not require a special election, though it authorizes such an election.

Removes Housing From 'Pressure Politics'

The amendment will particularly protect public housing from the present evils of pressure politics. Under Proposition 10, the necessity for any public body acting under such political pressures is removed, because it becomes mandatory to pass the proposal to the voters themselves for action.

Voters in many other states are allowed this privilege of American tradition, but because of a loophole in the California Housing Authorities Law, voters of California are

denied the right of referendum in the case of public housing. The people of two California cities—Eureka and Oakland—protested action of their city councils in approving such housing projects, even going so far, in Oakland, as to oust a councilman in a recall election. However, lacking the legal provision for referendum the people of Eureka and Oakland lost out and were saddled with political housing projects the majority did not want. Housing Authority bureaucrats throughout California have united in an all-out fight to deny the people the right to decide on such heavy long-term indebtedness. The people have the opportunity to put the bureaucrats in their place and restore to themselves, the people, this important right by passing Proposition 10.”

4. The proposed Housing Project in the City of San Jose and its rejection by the electorate

In 1966 the San Jose City Council resolved that there was a shortage of safe and sanitary dwellings in the city available to persons of low income and that there was need for a housing authority.⁸ It then appointed the commissioners for the Housing Authority as provided by California law (Compl., Ex. F; A. 25).

In 1968, in obedience to Article XXXIV of the State Constitution, the Housing Authority proposed to the voters of San Jose a low-rent housing project. The measure failed of passage at the election of November 5, 1968 by 57,896 votes to 68,527 (Compl., Ex. G; A. 28).⁹

5. This suit: the complaint

This suit was commenced on August 27, 1969. According to the complaint, plaintiffs are three mothers and their minor children, living in crowded or substandard housing (Compl. ¶¶ 5-8;

8. Pltfs. Request for Admn. attaching Resolution No. 28614, admitted by defendants. (A. 25-27, 41, 57).

9. Taxpayers' revolt in California has been statewide; few proposals for bonded indebtedness have surmounted the general concern over mounting taxes.

A. 3-5). The Jurisdictional Statement of the appellants in No. 154 asserts (at p. 2) that this "is a class action on behalf of the poor." That is not correct. The complaint alleged that plaintiffs sued on behalf of a class consisting of "all persons who are citizens of the United States and who are on the waiting list of the Housing Authority of the City of San Jose." (Compl. ¶ 9; A. 5). But F.R.Civ.P. Rule 23(a) provides that an action may not be maintained as a class action until a determination is made by the court that it may be so maintained. No such determination was ever sought or made. The action, therefore, is not a class action.

Named as defendants are the Housing Authority of San Jose, its Executive Director and Commissioners, the City Council of San Jose and its members, including appellant Virginia C. Shaffer (Request for Adm. ¶¶ 15, 18; A. 43, 58).¹⁰ After mingled statements of law, fact, and conclusions under the captions "The Public Housing Program in California" and "Public Housing in San Jose", the complaint contained three counts for declaratory relief and injunction. The first claimed a denial of equal protection of the laws, and it is the only count on which the court below based its judgment (See fn. 2 p. 2, *supra*). The prayer was for a declaration that Article XXXIV is void, for a mandatory injunction enjoining defendants "from refusing to proceed with the necessary steps leading to the construction of the 1,000 public housing units proposed by the Housing Authority of the City of San Jose in 1968 . . ." and for an injunction against ". . . enforcing, following[,] abiding by or relying on any of the provisions of Article 34 of the California Constitution." (A. 13).

Welcoming the suit as a means of being released from the obligation of their official oath to the State Constitution, the defendant members of the Housing Authority freely admitted allegations of the complaint and requests for admission. (A. 39,

10. The complaint also reports to name as defendants the United States Department of Housing and Urban Development and Secretary Romney. They were dismissed on motion (A. 171-2).

40, 55). The answer filed by the City Attorney for the defendant City councilmen, including appellant Shaffer, admitted much but did deny material allegations of the complaint (A. 63-68).

6. The meager record in the case

The record consists of the pleadings, affidavits attached to the complaint, responses to a request by plaintiffs for admission, certain additional affidavits, and a Stipulation of Fact. *There was no trial*. On that record plaintiffs moved for summary judgment. The record consists of the following alone:^{10a}

(a) Identification of the plaintiffs, the kind of housing in which they live, the rent they pay, their income, and what they receive from public welfare authorities (Compl. Ex. A, B, C; A. 14-20).

(b) An admission that the Housing Authority of San Jose "will not make application to HUD for a preliminary loan," and the City Council will not approve such an application or any construction contract for public housing, "until the proposal has been approved by the electorate in accordance with Article 34" (Pltfs. Request for Admn. ¶¶ 16, 19, 20; A. 43, 44, 57, 58).

(c) Affidavits of one Lockheld, an employee of the Planning Department of Santa Clara County (in which San Jose is located), that there is a shortage of low-cost housing in that county, and that rents are increasing, with the opinion that lack of adequate housing correlates with low income and minority status (A. 59-62), and an affidavit of one Wells, an employee of the San Jose City Planning Department, that in his opinion low income is the factor most highly correlated with substandard housing. (A. 67)

10a. Appellees have caused to be reproduced in the Appendix the record of *Hayes v. Housing Authority of San Mateo County* (A. 79-165). But that is no part of the record in *this* case. In *Hayes* all defendants defaulted (A. 160), and the case is not before this Court because no appeal was taken. The motion for summary judgment upon which judgment was entered in the instant case (A. 65) specified exactly what it relied on, and it specified no part of the file in *Hayes*.

(d) *A Stipulation of Fact* that housing for rental to persons of low income (as defined by Article XXXIV of the California Constitution) is the only kind of public housing in California, except for housing for state officials and state university personnel and housing incidentally acquired and temporarily held in connection with eminent domain proceedings. (A. 67, 68).

7. The motion for summary judgment and the decision below

Upon this bare and sparse record, plaintiffs moved for summary judgment (A. 68, 75, item 32,) and the District Court granted the motion. It declared that "Article XXXIV of the California Constitution is * * * unconstitutional and shall have no further force and effect" under the Equal Protection Clause of the 14th Amendment, and it enjoined the defendants "from abiding by or relying upon Article XXXIV as a reason for not requesting state or federal assistance with which to finance low income housing." (A. 178-9)

Obviously, the District Court declared Article XXXIV to be unconstitutional on its face, as an abstract textual conclusion reached by laying Article XXXIV alongside the 14th Amendment, for no other facts in the record were relevant to its conclusion. The facts identifying plaintiffs are no more than an effort to show standing to sue. The affidavits of the employees of the Santa Clara and San Jose planning departments state no more than that there is a need for low-cost housing.

The District Court placed its chief reliance on *Hunter v. Erickson*, 393 U.S. 385 (1969). Deciding the case solely on Equal Protection grounds, it said: "The gravamen of plaintiffs' Equal Protection claim is that the express discrimination in Article XXXIV, as it applies only to 'low-income persons', brings it squarely within the ban of a long line of Supreme Court decisions forbidding the unequal imposition of burdens upon groups that are not rationally differentiable in the light of any legitimate State legislative objective." (A. 173)

Noting that the plaintiffs in the *Hayes* case—although not those in the instant case—asserted that Article XXXIV also denies equal protection to Negroes, the court reviewed *Hunter v. Erickson* at length and concluded (A. 176).

"Here as in the *Hunter* case, the 'special burden' of a referendum is not ordinarily required; here, as in the *Hunter* case, the impact of the law falls upon minorities."

The District Court added (A. 176)

"The vice in this case is that Article XXXIV makes it more difficult for state agencies acting on behalf of the poor and the minorities to get federal assistance for housing than for state agencies acting on behalf of other groups to receive financial federal assistance. In California, state agencies may seek federal financial aid, without the burden of first submitting the proposal to a referendum, for all projects except low-income housing. Some common examples, *inter alia*, are: highways, urban renewal, hospitals, colleges and universities, secondary schools, law enforcement assistance, and model cities."

8. The Appeal; the reason for the separate representation of Appellant Shaffer

The present case is one of two raising the same issue, consolidated below for hearing. In the other, *Hayes v. Housing Authority of San Mateo*, (A. 79 et seq.), defendants did not even put up a token case; they defaulted (A. 160). Here the defendant Housing Authority of San Jose and those defendants who are members or officers of that Housing Authority have not even appealed. Appellant Shaffer is a member of the City Council of the City of San Jose, California and, as such, one of the defendants. After the notice of appeal was filed in the District Court—in haste¹¹—by the City Attorney on behalf of all the council members, Mrs. Shaffer substituted attorneys and has

11. The Notice of Appeal was filed just 8 days after the judgment below (A. 76).

come before this Court by separate counsel. This she has done because, in her belief, her fellow council members (the appellants in No. 154) do not desire the judgment to be reversed but seek to utilize the appeal to obtain this Court's affirmance in order to be freed of constraints of the Constitution of California. They appealed because, in the absence of voter approval, bond counsel will not approve bonds of the City and HUD will not approve an application for funds, unless this Court rules that Article XXXIV is unconstitutional. This is pretty much disclosed at page 16 of the Jurisdictional Statement in No. 154.

SUMMARY OF THE ARGUMENT

The decision embraces the long outmoded usage of the Fourteenth Amendment to strike down disfavored state policies, and it conflicts with the principles applied in *Spaulding v. Blair*, 403 F.2d 862 (4th Cir. 1968), *Ranjel v. City of Lansing*, 417 F.2d 321 (6th Cir. 1969), cert. denied 397 U.S. 980, and *Southern Alameda Spanish Speaking Org. v. City of Union City, Cal.*, 424 F.2d 291 (9th Cir. 1970). The assault on Article XXXIV of the California Constitution is an expression of a new distrust of democracy in favor of an elitism contemptuous of the wisdom and decency of the electorate. (p. 25, *infra*)

I. (pp. 26-31, *infra*)

The case was handled below essentially as a feigned case, with plaintiffs' standing to sue dubious, on a motion for summary judgment on self-serving affidavits not subject to cross-examination, without real opposition. Even under the most liberal criteria of "standing", a plaintiff must be injured in fact by the challenged action, and the case must be in a real adversary context. (*Data Processing Service v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970)). Plaintiffs claimed no more than that they were on the waiting list for housing; it was conceded that none can show that he would obtain new

housing if built. In fact, a trial would show that the low-income housing needed by the City of San Jose is not the kind plaintiffs require. Plaintiffs are merely names, conscripted by counsel who seek an advisory opinion. On the other hand, there has been no real defense. In the companion *Hayes* case, all defendants defaulted. Here the Housing Authority defendants essentially admitted the complaint and have not appealed. The City Council defendants put up indifferent opposition and appealed in order to obtain this Court's approval of the judgment, not reversal, except for appellant Shaffer who retained new counsel after appeal.

Because of the lack of real contest, the opinion below rests on unfounded assumptions of fact. For example, it leans on a premise that the public rejects low-income housing projects, reciting statistics covering 1950 to June 1968. Yet these very statistics show that 69% of the elections resulted in approval. Nor was the court informed that in the 19 subsequent elections from 1968 to date, 84% carried, and its attention was not called to the fact that the San Jose vote in 1968 was the only defeat in 11 public housing ballots in the State at that time. Similarly, unwarranted insinuations that rejection of public housing is racial discrimination ignores the fact that in the county in question the ratio of poor Negroes and Mexican-Americans to the total poor is practically identical with the ratio of all Negroes and Mexican-Americans to the total population. Thus poverty does not equal race in the locality.

In short, the judgment outlaws Article XXXIV as a bare metaphysical abstraction divorced from any stuff of reality, and outside of any real "case or controversy".

II.

(A) (pp. 31-32, *infra*). This case is unlike *Hunter v. Erickson*, 393 U.S. 385 (1969), or *Reitman v. Mulkey*, 387 U.S. 369 (1967), because Article XXXIV makes no racial classification, is not

expressed in terms of race or discrimination, and its adoption was animated by no racial purpose.

(B) (pp. 32-38, *infra*). Motives or purposes may not be taken on summary judgment, in favor of the judgment, *Fortner Enterprises, Inc. v. United States Steel Co.* 394 U.S. 495, 500 (1969). In fact, entirely legitimate reasons motivated the adoption of Article XXXIV and motivate voter treatment of housing projects. Article XXXIV was adopted in 1950 for reasons having nothing to do with either race or poverty. From the beginning of California's history as a State, its public policy has been that no major public indebtedness or liability may be incurred by any city or county without approval by the voters. (Cal. Const., Art. XI, Sec. 18; *Westbrook v. Mihaly*, 2 Cal. 3d 765 (June 30, 1970)). So also, it has long been California's public policy that every legislative action, state or local, is subject to referendum (Cal. Const. Art. IV, Sec. 1). Loopholes in both of these public policies, as applied to low-income housing, were discovered when the State Supreme Court held that a "housing authority" is not a "city or county" and may therefore incur indebtedness not subject to Art. XI, Sec. 18 (*Housing Authority v. Dockweiler*, 14 Cal.2d 437; 94 P.2d 794 (1939)) and that acts of the local governing body and housing authority relative to low-income housing were "executive and administrative", not legislative, and therefore not subject to referendum (*Housing Authority v. Superior Court*, 35 Cal. 2d 550, 219 P.2d 457 (1950)). It was in response to these decisions, and in immediate response to the latter, that Article XXXIV was adopted, not as a new policy applicable to housing, but as reaffirmation that housing should not be immune from ancient policies of universal application and that housing officialdom should not be singled out for preferential freedom from basic controls.

The considerations of fiscal control are important, because low-rent housing projects impose on the local government the burden for 40 years of supplying all municipal services—schools,

police and fire protection, streets, sewers, drains, etc.,—with taxes waived. The financial burden on the locality approximates 60% of what normal tax receipts would be, even on values calculated at the low rental base, and 50% of the federal contribution.

The *non-fiscal* considerations also loom large. Many reasons unrelated to race or poverty exist why voters may disapprove a particular housing project. After years of experience, students of the subject and spokesmen for the poor and minority groups increasingly reject public housing. The Kerner Commission report shows conventional public housing to be psychologically debilitating and sociologically oppressive. Experts accuse public housing of creating problems in city planning, redevelopment, zoning, aesthetics, as working major changes in the urban environment, creating "central city" ghettos, thereby breeding racial segregation and compounding crime and social disorganization. The national housing program as practiced is accused of having been destructive of community, compartmentalizing modes of living unrelated to human needs and desires. *Surely voters are entitled to a voice in decisions which may alter the characteristics of their environment for generations.*

Accusation that the poor in California are not as well-housed as elsewhere is based on meretricious use of statistics. If the issue were relevant, there should be a plenary trial to develop a complete and factual basis for constitutional determination, not disposition by summary judgment. The accusation rests on simply counting the number of publicly-built low-income units *per capita*. It overlooks the fact that elsewhere than California so much more private housing becomes uninhabitable as to offset public housing, and that there are other federal housing programs conceived after the Housing Act of 1937, hailed as vastly superior, and not subject to Article XXXIV. There are the leased-housing rent subsidy, in which California has taken the lead, rent supplement programs, and direct interest subsidies to lenders

on private construction. A report to the National Commission on Urban Problems concludes that the shelter needs for a large part of the low and moderate income population can best be served through federal stimulation of private development and by cash subsidies. The question is not whether one method of providing housing is better than another. The point is that voters may legitimately think so and may therefore deny to a housing authority the option of choosing an easy but unwise solution.

C. (pp. 43-45, *infra*). Apart from racial classification, "equal protection" is not denied if any state of facts can be rationally conceived to support a State classification. Furthermore, one who complains must show that someone comparably situated has been better treated. *National Union v. Arnold*, 348 U.S. 37, 41 (1954).

Here there is no classification by race, nor is there either classification by poverty or discrimination against poverty. The statement that laws may not deprive the poor of basic rights of citizens is true but not apropos. Indigency is a social, economic and political situation to which government must give its attention, and directing legislation to the problem of poverty is not classification on the basis of poverty. In turning its attention to the subject, a state has vast freedom as to what to do and how. Apprehending a need or an evil, the lawmaker may focus on it and legislate about it without requiring similar treatment of other matters, *Patson v. Pennsylvania*, 232 U.S. 138 (Holmes, J., 1914), *Barbier v. Connelly*, 113 U.S. 27, 32 (1885). Classification is not measured by an apothecary's scales. Publicly-supported housing is a subject by itself, and of its very nature it concerns those of low income.

D. (pp. 45-52, *infra*). There is no claim of discrimination *within* the area of public housing; that is, no claim that Article XXXIV discriminates among those to whom it applies or within its subject matter. Therefore, the district court sought to draw an external contrast with other federal-aid programs—specifically,

highways, urban renewal, hospitals, education, law enforcement, and model cities, asserting that Article XXXIV makes it more difficult to obtain federal-aid for housing. The contrast is specious and unsound, cursory, without citation of statute, with neither analysis nor statement of what the other programs are, when they came into being, how they operate, or wherein there is such likeness to housing as to require identity of treatment. These programs all vary widely. Otherwise Congress itself would be guilty of unequal protection in the widely different ways it has tailored its offers of aid and has conditioned them. A provision of ancient vintage, neither originally adopted nor carried forward for an unlawful purpose, does not violate the equal protection clause. *Carter v. Jury Commission*, 396 U.S. 320 (1970). Therefore, a state Act that cannot be accused of denying equal protection when adopted, because nothing then exists against which it can be said to discriminate, does not passively become unconstitutional from the fact that the federal government later creates programs of assistance in other fields. Except for urban renewal and some hospital aid, all the federal programs mentioned by the court were created by Congress long after Article XXXIV was adopted, and California made no statutory response to urban renewal until after the adoption of Article XXXIV.

Urban renewal is a subject so peculiar and complex that it covers 110 pages in California's statute books, and voter approval is specifically required in every vital respect (see Cal. statutes cited on pp. 48, 49, *infra*). Indeed, it was gratuitous assumption below to suggest that other programs do not require voter approval at vital nodes under the general provisions of the state constitution and city charters.

The attempted contrast of housing with aid to highways is particularly not apt. One of the prime motives underlying Article XXXIV was to protect the local taxpayer and to preserve local responsibility. But in California highways and roads do not involve the local purse; the cost is borne by the State treasury

(See statutes cited at pp. 49, 50, *infra*). As for federal aid to education, we find nothing in state or federal statutes requiring local governmental agencies to share the expense of the federally-aided programs. And as to law enforcement assistance, California has not yet enacted legislation governing how state or localities are to respond to the offer.

Moreover, none of the federal aid programs referred to below raises any of the political, sociological or environmental questions that housing does. Thus no one can object to better hospitals. Hospitals serve the whole public; if any "group" is more advantaged than another, it is the poor themselves.

E. (pp. 52, 53, *infra*). The very federal legislation which led to Article XXXIV demonstrates the reasonableness of requiring voter approval. The Housing Act of 1937 emphasizes that local control and local determination of need are the keynote policy (42 U.S.C. § 1401, 1415 (7) (a,b)). What more reasonable than that the voice of local determination be the voice of the people themselves? Eight months after California adopted Article XXXIV Congress by the Independent Offices Appropriation Act specified that the federal housing authority "shall not" authorize any project rejected by public vote in the locality. Congress repeated the proscription in the two following years (see p. 7, *supra*). Although not repeated after 1953, this federal proscription demonstrates the reasonableness of placing low-cost housing in its own category peculiarly justifying voter approval.

F. (pp. 54-61, *infra*). Since motive and purpose of the adoption of Article XXXIV and of voter action under it are not questionable, the case reduces itself to the bare claim that it is unconstitutional to require voter approval of any kind of federal aid however large the consequent burden and far-reaching the effects, unless voter approval is required for all other federal aid, however slight or insignificant. This is simply an assault on a structure of government. A state's determination of how to distribute state power among its governmental organs is a matter not justiciable in a

federal court, *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937); *Hughes v. Superior Court*, 339 U.S. 460, 466-7 (1950). State sovereignty stems from the people, and they may retain all or any part in their own hands. *Pacific Tel. Co. v. Oregon*, 223 U.S. 118 (1912). Since the burden of public housing falls financially and environmentally on the local citizenry, the people of California reserve to themselves that part of the sovereignty covering the determination whether to accept the offer of federal aid. While a "legislative structure which otherwise would violate the Fourteenth Amendment is not immunized by referendum" and constitutional restraints on the sovereignty of states applies as much when that sovereignty is exercised by the people as by a legislature, *Hunter v. Erickson*, 393 U.S. 385 (1969), neither principle applies here. *Nothing is here claimed to violate the Fourteenth Amendment but the provision for referendum itself.*

The subject matter of "equal protection" is the impact of law on the citizenry; the question asked is whether the law lashes one more than another or gives privileges to one and not another, where both are in like position. *But the district court asks a radically different question:* Conceiving of society as composed of contesting pressure groups, it asks whether the machinery of government makes it more difficult for one group to obtain advantages from the state than another. But by its very nature the democratic process makes it less possible for a small group than a large to obtain its wishes, for it numbers fewer voters. The "equal protection" clause cannot be a mandate to courts to analyze different forms of governmental structure to determine which is more likely to be equally attuned to the demands of all groups. If apportioning state sovereignty *via* the referendum makes it more difficult for a particular group to obtain advantages, that apportionment is not constitutionally vulnerable, at least so long as it is based on neutral principles and not to achieve racial discrimination. *Spaulding v. Blair*, 403 F.2d 862 (4 Cir. 1968);

Ranjel v. City of Lansing, 417 F.2d 321 (6 Cir. 1969) cert. den. 397 U.S. 980, *Southern Alameda Spanish Speaking Organization v. City of Union City, Cal.*, 424 F.2d 291 (9 Cir. 1970).

If the equal protection clause permits inquiry into whether the machinery of government makes it more difficult for one "group" to obtain advantages than another, at least the "groups" should exist in reality and not merely as theoretical constructs, and they should be pin-pointed. If the construct of a group called "the poor" is warranted, still there is no "group" advantaged by "highways", "hospitals" or any of the other federal-aid programs referred to in the opinion below. These benefit the whole of the social organism. That is also true of housing, and it is for that reason that housing legislation is constitutional. *Berman v. Parker*, 348 U.S. 26 (1954); *Housing Authority v. Dockweiler*, 14 Cal. 2d 497, 94 P.2d 794 (1939).

The democratic process is not one of scientific precision but of experience and an experiment. *Sailors v. Kent Board of Education*, 387 U.S. 105, 109, (1967); Brandeis, J., dissenting in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932). People become aroused by, and legislate about, specifics, not theoretical wholes. If "equal protection" were interpreted to require them to refrain from acting unless they devise an all-inclusive body of legislation covering all situations acute minds might later think to be similar, the democratic process could not function at all.

The initiative and referendum, like the equal protection clause before them, was born of a surge of democracy to curb the entrenched and powerful. Yet now the referendum is attacked as disadvantaging the disadvantaged! The animating spirit of the attack is a distrust of the wisdom and fairness of the voter. Surely, one product of the democratic surge, equal protection, cannot be used to destroy the other, the final authority of the voter.

ARGUMENT

It is our submission that the court below has embraced the very usage of the 14th Amendment outmoded in the 1930's and warned against in *Dandridge v. William*, 397 U.S. 471, 484 (1970), to strike down state policies incompatible with its own outlook, albeit from a different direction. And, as shown at pp. 58-60, *infra*, the decision conflicts with the principles recently applied by the Fourth Circuit in *Spaulding v. Blair*, 403 F.2d 862 (1968), by the Sixth Circuit in *Ranjel v. City of Lansing*, 417 F.2d 321 (1969), cert. den. 397 U.S. 980, and by the Ninth Circuit in *Southern Alameda Span. Spg. Org. v. City of Union City, California*, 424 F.2d 291 (1970).

Indeed, the assault on Article XXXIV is a manifestation of a new distrust of democracy and democratic processes in favor of an elitism that considers itself a wiser guide for the solution of the economic and social problems of the republic, an elitism contemptuous of the wisdom and fairness of ordinary voter. This distrust is not only disturbing, it is paradoxical, for it seizes on the egalitarianism of the "equal protection clause" to denounce a democratic process as unconstitutional.

I. The Case Below Was Essentially a Feigned Case, with Dubious Standing of Plaintiffs to Sue, and Improperly Disposed of on Summary Judgment.

The case was decided without trial, on a motion for summary judgment, essentially on self-serving affidavits, without thorough opposition and pretending to be a suit of those whose standing to sue is, to say the least, dubious.

The criteria of standing to sue have been in change and flux, but we think that no decision of this Court and no articulation by it has yet gone so far as to recognize standing in plaintiffs here. *Flast v. Cohen*, 392 U.S. 83 (1968) dealt with standing in a taxpayer's suit, and *Data Processing Service v. Camp*, 397 U.S. 150 (1970) recognized standing in one competitor to challenge action benefiting another competitor. In *Data Processing*, the

opinion of the Court quotes *Flast* as relating the question of standing to "whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution" and turns the decision on an affirmative answer to the question "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise" (pp. 151-2). In *Barlow v. Collins*, 397 U.S. 159 (1970), tenant farmers were held to have standing to challenge an administrative regulation impairing the power to assign certain federal payments as security to finance the making of crops, because the regulation injured the tenant's economic relation to their landlords. The Court's opinion rested its decision on the fact that in the context of the litigation the tenant farmers "have the personal stake and interest that impart the concrete adverseness required by Article III [of the Constitution]" (p. 164) and were within the "zone of interests" to be protected by the Constitution or statutory provisions invoked. The opinion of Mr. Justice Brennan, urging an even more liberal criterion for standing, refers to the discussion in *Baker v. Carr*, 369 U.S. 186 (1962), relates standing to "justiciability", notes that other elements of justiciability are "ripeness" and "the policy against friendly or collusive suits" (p. 171), and urges that the objectives of the "standing requirements are simple: the avoidance of any use of a 'federal court as a forum [for the airing of] generalized grievances about the conduct of government,' and the creation of a judicial context in which 'the questions will be framed with the necessary specificity, . . . the issues . . . contested with the necessary adverseness and . . . the litigation . . . pursued with the necessary vigor to assure that the . . . challenge will be made in a form traditionally thought to be capable of judicial resolution.'"¹²

12. Standing is thus related to the policies against the rendition of advisory opinions or the entertainment of litigation that is not really contested. *State Federation of Labor v. McAdory*, 325 U.S. 450, 461 (1945); *Texas v. ICC*, 258 U.S. 158 (1922); *Giles v. Harris*, 189 U.S. 475, 486 (1903); *C&S Airlines v. Waterman Corp.*, 330 U.S. 103 (1948); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947); *Muskrat v. United States*, 219 U.S. 346, 354 (1911).

None of these elements is here present. Here plaintiffs alleged only that they "are on the waiting list for placement through the Housing Authority of the City of San Jose and have been on said list for more than one year." (Complt. ¶ 4; A. 3). The court below recognizes in its opinion (A. 170) that plaintiffs

"cannot of course demonstrate that any particular named plaintiff would be able to occupy new housing if such housing were built."

The possibility that plaintiffs would "occupy new housing if such housing were built" becomes tenuous to the point of non-reality in the factual context of the low-income housing needs of the City of San Jose. Under contract with the City, Kaiser Engineers made a study of those needs and concluded that most of the "families" eligible for public housing were so small that what should be supplied was no-bedroom or one-bedroom apartments: "The most serious unmet need is in the smaller units with no bedrooms (studio apartments) and one bedroom."¹³ Presumably the City of San Jose, were it freed from voter veto to provide public housing, would direct that housing where most needed. If so, large families like plaintiffs would not be the beneficiaries, and plaintiffs cannot speak for others, *McCabe v. A.T.&S.F. Ry. Co.*, 235 U.S. 151, 162 (1914), approved in *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

Self-evidently, plaintiffs are not even the moving force in the suit; their names have been conscripted by counsel interested in obtaining an advisory opinion serviceable to their social views.

Assuming that this fact still insures the necessary zeal on the one side of the case, *there has been no such zeal on the other.* Cf. *United States v. Johnson*, 319 U.S. 302 (1943). As we have

13. Kaiser Engineers, Housing Study, Phase I—public housing for City of San Jose, California, March 1970, p. V-17; and Section V, particularly sub-chapter C and Tables 13 and 14.

seen, this case (*Valtierra v. Housing Authority of San Jose*) was consolidated below with *Hayes v. Housing Authority of San Mateo*, and there the defendants defaulted. Since the principal opposition to the adoption of Article XXXIV came from housing authorities, (see p. 11 *supra*) a housing authority as defendant is the most unlikely party to endeavor to sustain Article XXXIV against attack. In the *Valtierra* case, one group of defendants, the Housing Authority of San Jose and its personnel, freely admitted the averments of the complaint, including many conclusory ones, and have not appealed. The other group—the members of the City Council—put up an indifferent opposition to the motion for summary judgment (See pp. 13, 15 *supra*). Considering that they had proposed the housing project, the City Council was not an ideal group to defend rejection of that project by the electorate.

True enough, in this Court appellant Shaffer, through separate counsel, now earnestly opposes the judgment of the court below. But the fact remains that the case was decided below on a sketchy record, on summary judgment, in consequence of which *the opinion rests on statements of assumed fact that simply are not so*.

For example, believing it supportive of the decision rendered, the court below states in its opinion (A. 170) that only 52% of low-income housing units submitted to the voters throughout California in the first 18 years during which Article XXXIV has been in effect were approved. This conclusion was attributed to document entitled "Public Housing Referenda Thru June 14, 1968" and footnoted "Source: California Department of Housing and Community Development, August 8, 1968."¹⁴ What the document actually shows is that, while 52% of the housing *units* proposed were approved by the voters, there were 127 referenda

14. This document was appended to plaintiffs' "Memorandum of Points and Authorities in Support of Complaint for Declaratory and Injunctive Relief," which was filed with the complaint and appears at A. 34 et seq. We question whether it is properly part of the record, but do not dispute its statistics.

and 69% of the elections resulted in votes favorable to the project.¹⁵

Moreover, the statistics were already out-of-date when relied on. Subsequent to June 14, 1968, there were 19 more housing projects submitted to voters in California, and 16, or 84%, were approved. The 19 projects involved 9,290 units, and the 16 approvals covered 6,690 or 72%. All this is shown by a document dated June, 1970, entitled Public Housing Referenda, supplied by the San Francisco Regional Office Area of the Department of Housing and Urban Development and listing all low-income housing referenda in California since 1950. The disapproval by the electorate in San Jose was one of the three.¹⁶ The voters of major areas like San Francisco, Sacramento and Santa Barbara approved the projects submitted to them.

Still further, material before the court below and inconsistent with its view of the facts was not even called to its attention. Docket item 29 in the District Court (noted at A. 75) is a first draft of a report entitled "The Housing Situation: 1969, Santa Clara County". That draft states (at p. 87) that "the San Jose vote * * * was the *only* defeat of 8 public housing ballots in the state at that time", the election of November 1968. The final edition of this same report corrects this sentence to read (pp. 70, 71): "The San Jose vote * * * was the only defeat of 11 public housing ballots in the state at that time".

Thus the assumption that the electorate votes against low-income housing or that Article XXXIV is a roadblock to the poor is false. As the need of public housing has increased, the public has responded by an increasing percentage of favorable votes. Mistrust of the democratic process has not been warranted.

15. The disparity between the number of successful elections and the number of approved units is in part at least due to the rejection of a monstrous proposal in Los Angeles for 10,000 units.

16. Another of the three was Fresno, which explains why plaintiffs went to a Fresno housing authority official for an affidavit (A. 21), a highly selective presentation of argument in affidavit form.

Another example of how the District Court was misled by failure of truly adversary presentation is to be found in its reliance on a fictitious racial factor. Speaking of *Hayes v. Housing Authority of San Mateo*, in which defendants defaulted, the court commented that the "poor persons" who there sued were "predominantly Negro" (A. 170), and the opinion embraces the argument that "low-income projects * * * will be predominantly occupied by Negro or other minority groups" (A. 174). *But the statistics as to San Jose and Santa Clara County are quite otherwise.* In 1966 the Santa Clara County Planning Board took a special census and updated it in 1969. According to this census, only 1.4% of households of an income of \$3,000 or less are Negro, and 88.1% are white (excluding Mexican Americans).¹⁷ Coupled with data in the record,¹⁸ these figures demonstrate that the poor Negroes and Mexican-Americans constitute the same proportion of all poor as Negroes and Mexicans of all economic levels constitute of the total population. *Thus poverty does not equal race in San Jose or Santa Clara County:* the racial minority groups are no poorer than the population as a whole.

Other examples of inadequate data before the court below will appear throughout this brief.

If this case involved private interests alone and were truly an adversary contest, failure of defendants to respond to the motion for summary judgment adequately might possibly preclude reliance in this Court on matter not in the record. *But this is not a*

17. The foregoing appears in "Info., County of Santa Clara Planning Department, 70 W. Hedding St., San Jose, California 95110, Economics, September, 1969, pp. 344, 345." It is repeated in a report prepared by Kaiser Engineers of Oakland, California, under contract between the City of San Jose and Kaiser Engineers, dated January 21, 1970, entitled Housing Study, Phase I—Public Housing, for City of San Jose, California, Report No. 70-10-R, March 1970, transmitted to the City under date of March 13, 1970.

18. The record contains an affidavit of Mr. Tyr V. Johnson, Commissioner of the Housing Authority of Santa Clara County, which states that Negroes constitute but slightly more than 1% of the population of the County and Mexican-Americans about 9.5% (A. 31 at 32).

private controversy. It involves the very factor which lies behind the direct appeal from a judgment of a three-judge court—"procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy", *Phillips v. United States*, 312 U.S. 246, 251 (1941).

In short, the judgment below issued as a pure advisory opinion outside the context of any real Article III "case or controversy". It outlawed Article XXXIV of the California Constitution as a bare metaphysical abstraction divorced from the stuff of reality.

II. Article XXXIV, California Constitution, Does Not Violate the Equal Protection Clause.

A. THE CASE IS UNLIKE *HUNTER V. ERICKSON* AND *REITMAN V. MULKEY*. THERE ARE NO RACIAL ELEMENTS.

This case is unlike *Hunter v. Erickson*, 393 U.S. 385 (1969). There the City of Akron had a housing ordinance, enacted by its City Council, prohibiting discrimination on the basis of "race, color, religion, ancestry, or national origin", and the ordinance set up machinery to enforce its anti-discrimination provisions. The city charter was then altered by initiative for the express purpose of creating a racial classification. The charter amendment provided that any ordinance regulating use, sale, lease or other handling of real property "on the basis of race, color, religion, national origin or ancestry" required the approval of the electors before it could take effect. The charter not only repealed a fair housing ordinance aimed at racial discrimination, and deprived plaintiff of an existing cause of action for discrimination, but it set up a classification based on race. In the words used by this Court to distinguish the situation, "there was an explicitly racial classification treating racial housing matters differently from other racial and housing matters" (p. 389).

Nor is this case like *Reitman v. Mulkey*, 387 U.S. 369 (1967),¹⁹ in which the initiative provision also went farther than mere repeal of state anti-racial discrimination legislation. This Court there relied upon a construction by the Supreme Court of the State,

19. Not cited below but cited in *Hunter v. Erickson*.

binding on this Court, that the intent of the initiative amendment was to create a constitutional right to discriminate on racial grounds (387 U.S. at 376).

In *Southern Alameda Span. Spg. Org. v. City of Union City, Cal.*, 424 F.2d 291 (9th Cir., 1970), the court pointed out that in *Reitman v. Mulkey*,

"The only 'conceivable purpose' [of the provision held to be unconstitutional], judged by wholly objective standards, was to restore the right to discriminate and protect it against future legislative limitation." (p. 295)

B. ARTICLE XXXIV HAS NO INVIDIOUS PURPOSE, LEGITIMATE REASONS MOTIVATED ITS ADOPTION, AND LEGITIMATE REASONS MOTIVATE VOTER TREATMENT OF HOUSING PROJECTS.

The *Hunter* and *Reitman* cases and this case are poles apart. Article XXXIV repeals nothing, it is not expressed in terms of race or discrimination, it had no unconstitutional motive, and it has no unconstitutional effect. It is *neutral*. Its sole purpose and effect are to reserve to the people in a community the right to determine whether a proposed housing project (a) is desirable and (b) justifies the financial burden. We briefly review (a) the effect, and (b) the motive or purpose.

1. Effect

We have just seen (at pp. 28, 29 *supra*) that the voters have exercised their power in *favor of—not against*—the project on over 2/3 of the occasions presented to them, and that in the last two years they have approved 84% of the projects, involving 72% of the proposed units. California has taken pride in the success of school bond issues, as a "high tribute to the traditional regard in which Californians have had for education"; yet from 1954 to 1969 only 75% of school bond issues passed.²⁰

20. A California Assembly Interim Committee on Revenue and Taxation, in a report "Taxation of Property in California", Dec. 1969, commented that "California voters have approved 75 percent of the bond issues brought to a vote since 1954-1955, a high tribute to the traditional regard in which Californians have had education". The taxpayers' revolt has greatly reduced that figure since then.

2. Motive or Purpose of Article XXXIV of the California Constitution

Summary judgment is improper where issues of motive or purpose are relevant, *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 500 (1969). Therefore, no unconstitutional or improper motive can be assumed to have animated the adoption of Article XXXIV or voter action under it, and, in fact, the record is overwhelmingly clear as to the legitimacy of the motives.

As we have seen (pp. 8-11, *supra*), the reasons presented to the voters in favor of adoption of Article XXXIV in 1950 had nothing to do with race or poverty. They were exclusively (a) fiscal and (b) political.

(a) *Fiscal considerations:*

Almost from its beginning, public policy in California has insisted that major public indebtedness may not be incurred without approval by the voters; it has insisted that fiscal control be in the voters' hands. Thus the State Constitution provides that no city, county or school district shall incur an indebtedness or liability in any manner exceeding the income of that government for one year except with the consent of the voters at an election. (Art. XI, Sec. 18). This restriction was added at the Constitutional Convention of 1879 because of a groundswell of public demand produced by excessive municipal indebtedness and numerous defaulted bond issues.²¹

This history is detailed at much length in *Westbrook v. Mihaly, as Registrar of Voters*, 2 Cal. 3d 765 (June 30, 1970).^{21a} There the

21. See, for example, Van Alstyne, Arvo, "Background Study Relating to Article XI: Local Government," Calif. Constitution Revision Commission.

21a. *Westbrook* declares a requirement that the approval be by 2/3rds vote unconstitutional but still requires a majority vote.

opinion notes that the California Constitution of 1849 required any state indebtedness in excess of \$300,000 to be approved in a statewide referendum (Cal. Const. of 1849, Art. VIII), and that many charter cities required elections before indebtedness could be incurred.

"The bubble burst in the 1870's as California followed the rest of the nation into a severe financial depression. * * * It was thus in an atmosphere of economic and political crises that the delegates to the Constitutional Convention set to work in 1878.

"A combination of state and local mismanagement, aggravated by the depression, had created widespread concern over excessive municipal indebtedness and the processes of local debt formation." (pp. 775-6)

* * * *

"It is also apparent that Article XI, section 18 [of the present constitution, adopted in 1879] was intended to compel local legislative bodies to inform the public of projects necessitating long term expenditures and to give to the people the ultimate power of approving or rejecting them." (p. 776-7)

As these state constitutional controls have from time to time over the years been eluded because the words of the 1879 constitution did not fit new or ingenious devices, the public has enacted measures to preserve or regain its controls. In *Housing Authority v. Dockweiler*, 14 Cal.2d 437, 94 P.2d 794 (1939), it was held that a housing authority, although a public corporation, was not a "city or county" and therefore could incur indebtedness not subject to Article XI, Sec. 18. *It was to rectify this erosion with respect to low rent public housing projects that Article XXXIV was sponsored and adopted—not to create a special procedure for housing but to bring housing within the traditional controls.*

Appellees have asserted (e.g., in their motion to dismiss in No. 154) that "No local funds are used; the cost of the program is borne completely by the federal government and by the tenants

of the housing units." This is either naive or uncandid; in any event, it is erroneous. Low rent housing projects are constructed through 40-year bonds issued by the local housing authority. Although the federal government contracts to make annual contributions sufficient to pay interest and principal, the local governing body must contract to provide all municipal services for the 40 years and to waive all taxes, receiving in lieu 10% of the rentals, and the rentals are, of course, purposefully and artificially low. Among the local services to be supplied are schools, police and fire protection, streets, sewers, drains, lighting.

In consequence, the financial burden on the locality comes to 60% of what the normal tax receipts from the property would be, even on values calculated at the low rental basis. The well-known and esteemed Commonwealth Club of California, in its analysis of proposed Article XXXIV, concluded and stated in 1950 that "it is expected that value of the contributions which localities make by foregoing full ad valorem taxes on the projects occupied by low-income families, less in lieu payments which are received, will approximate 50% of the federal contribution over the life of the project."²² Inasmuch as property tax rates have risen drastically since 1950 in march with the higher costs of providing municipal services, the burden upon the local community is now considerably greater. Literature from federal agencies and public housing agencies today refrains from making any estimate of local sharing.

(b) *Non-fiscal considerations:*

In addition to fiscal control, there is another basic reason, unrelated to race or poverty, why voters should have the final word—the fundamental policy of California about the supremacy of referendum (Cal. Const., Art. IV, Sec. 1; see p. 6 supra).

22. *The Commonwealth*, Commonwealth Club of California, October 9, 1950.

Article XXXIV reassured the voters of that final word over low-income housing after court decision declared it absent on what, to the voters, was word-play about "legislative", "administrative", and "executive" (pp. 6, 7 *supra*). And in addition to the fiscal, there are many reasons, having nothing to do with race or poverty, why local voters might disapprove a particular housing project presented to them. No person knowledgeable in housing and sociology will say, in A.D. 1970, after years of experience, that public housing is necessarily desirable or good for minority groups or for those of low income. The issues are far more subtle. Spokesmen for the poor and for minority groups increasingly reject public housing. Whether rightly or wrongly we do not say; that is a matter on which courts may take no position. *But the reasons for rejection are legitimate questions to be put directly to the voters of a community.*

Just recently the Kerner Commission (National Advisory Commission on Civil Disorders) said in its report (Bantam ed. 1968, at p. 478), that federal policies have dictated that most housing projects "be of *institutional design and mammoth size*". Yet many sound thinkers object to "institutional design" and to "mammoth size" as psychologically debilitating and sociologically oppressive. They create problems in city planning, redevelopment and zoning. Voters may object to them on esthetic grounds or upon the ground that such projects tend to perpetuate rather than overcome racial segregation, or upon the ground that large concentrations of low-income housing creates a major change in the environment, a creation of a "central city" divorced from its surroundings. The Kerner report (p. 474) observes:

"Federal housing programs must be given a new thrust aimed at overcoming the prevailing patterns of racial segregation. If this is not done, those programs will continue to concentrate the most impoverished and dependent segments of the population into the central-city ghettos where there is already a critical gap between the needs of the population and

the public resources to deal with them. This can only continue to compound the conditions of failure and hopelessness which lead to crime, civil disorder and social disorganization."

The United States Department of Housing and Urban Development has said:²³

"Between 1937 and 1965, [Local Housing Authorities] provided low-rent housing primarily by new construction. By the 1960's, however, it was clear that new construction alone could not meet the tremendous need for decent housing at low rents *Clear too was the fact that housing developments in which all the occupants are at or near the poverty level do not make the most satisfactory environment for all low-income people.*"

"To meet changing conditions, new methods were needed."

The President's Committee on Urban Housing has written:²⁴

"Since a slum is defined not only by dilapidation but also by exclusion and negation, one must pay attention to location and to mixtures of groups and income levels. Subsidized low-income housing should not be concentrated in the present slums but scattered throughout the metropolitan areas. Such housing should not be built in great aggregates but in smaller collections of units. The excessive concentration of people of one narrow income level or age or race in one area should be avoided."

A report by George Schermer Associates, "More Than Shelter, Social Needs in Low- and Moderate-Income Housing", prepared

23. HUD, Housing For Low Incomes Families, p. 5 (1967).

24. Report of The President's Committee on Urban Housing, A Decent Home, p. 48 (December 11, 1968); U.S. Gov't. Printing Office: 1969 O-313-937. While the complaint in the present case alleges that the housing project submitted by the San Jose City Council to the voters proposed to disperse the units, the judgment below is not limited to San Jose. It outlaws Article XXXIV throughout the State. The passages quoted above show the variety of considerations an electorate may legitimately consider.

for the consideration of the National Commission on Urban Problems²⁵ contains among its principal conclusions the following:

"6. Public housing has made little contribution toward the development of a sense of community among its own tenants or between tenants and the surrounding neighborhood. The formula for conventional public housing has been inherently anti-community. However, some of the new approaches to public housing may remedy this deficiency." (p. vi)

And it amplified (p. 56):

"On the basis of these tests, it can be said that until very recently, the several elements of the national housing program tended to be destructive of community, especially with respect to low-income people and the central areas of the city.

* * *

"The conventional public housing formula has been too rigid. Public housing was a mechanistic rather than a humanistic program. It attempted to force people into compartmentalized modes of living quite unrelated to human needs and desires." (p. 64)

In short, public housing can have major sociological effects. *Voters are entitled to a direct voice in decisions which alter the characteristics of their very environment for generations.* Votes for or against a particular project find explanation in a multitude of reasons.

3. Article XXXIV Is No Bar to Adequate Low-Cost Housing.

Appellees' motion to affirm in No. 154 (at p. 6) purports to give statistics that with "8% of the nation's poor, California has only 4% of the low income housing units" and has constructed fewer "low income units per 1000 low income family groups"

25. Research Report No. 8, Washington, D.C. 1968; U.S. Government Printing Office: 1968 0-321-640.

than other states like New York. If questions like these are relevant at all to the issues in the case, there should be a plenary trial in which a complete and factual basis for a constitutional determination can be made. These supposed statistics are no part of the record; they were merely asserted in an appendix to the complaint without any effort at authentication (A. 38). *And they are meretricious.* Is it being insinuated that the poor of California are not as well housed as the poor elsewhere? Is it being suggested that "low income" housing under the Housing Act of 1937 is the only housing for the poor? This kind of argument illustrates the vice of a summary judgment.

There are enough facts of which judicial notice is available to indicate that the insinuations are unsound, both as to housing for the poor elsewhere than California and the availability of other kinds of housing for the poor in California. Thus, despite the greater number of units of low income housing per 1000 constructed in New York, primarily in New York City, housing there is in crucial shortage because numerous units have become wholly uninhabitable.²⁶

Moreover, other federal housing programs, conceived much later than the Housing Act of 1937, offer significant alternatives to institutional housing projects and are hailed as vastly superior. One reason the electorate might disapprove a public housing project may be to deny to the housing authority the option of choosing the easy, immediate, visible but merely symptomatic solution. Rejection of a project forces authorities to face the issues

26. A statement of Jason R. Nathan, Administrator, Housing and Development Administration, before New York State Housing Committee, November 7, 1969, states that despite New York City's "record breaking publicly-assisted construction" (p. 4) "crisis" or "disaster" is imminent in New York (p. 1) because of "the amount of housing draining out from the bottom of the reservoir", twice as many units being abandoned as constructed (p. 4). Barron's National Business and Financial Weekly, March 16, 1970, states that nearly 100,000 rental units in New York City have become uninhabitable within the last three years. Mr. Nathan states that 500,000 units are on the way out (p. 5).

of curative relief through the use of new approaches. One of them is the leased house-rent subsidy plan.²⁷

As stated by the Department of Housing and Community Development of the State of California, the "leasing program provides the machinery by which existing vacant dwellings within a community may be leased by its local housing authority at prevailing rents and then subleased to a low income senior citizen or families at rents within their financial reach."²⁸ California has a higher proportion of subsidized leased housing than any other state. It has taken the lead in this new form of low income housing thought by many to be more enlightened. "[A]bout one-third of the total leased units for the nation are in California. * * *

The impact of the leasing program has been significant in California."²⁹ For example, the San Jose Housing Authority has nearly 2,000 leased units (Lockfeld Aff., A. 61). Under the leased housing-rent subsidy plan the Housing Authorities lease, for terms up to five years, existing housing in the community—ideally and generally geographically distributed through the community—from private owners and then sub-lease it to families of low-income, providing a subsidy in the rental based on the income of the tenant. About 23,000 of such units were authorized in California (since the inception of the program in late 1965).³⁰

Another alternative to the institutional housing project is the rent supplement program.³¹ Under that program (12 U.S.C. § 1701s), housing is privately built, owned and managed by non-profit, limited dividend or cooperative organizations with FHA

27. Provided for by the 1965 Housing and Urban Development Act, Section 23 (42 U.S.C. 1421b); HUD, Housing Assistance Administration, Housing for Low-Income Families (1967); HUD, FHA, The Leasing Program for Low-Income Families (1967).

28. Annual Report, 1969, Department of Housing and Community Development of the State of California, p. 22.

29. Ibid, p. 23.

30. Ibid, p. 22.

31. HUD, The Rent Supplement Program for Low-Income Families (1968)

mortgage financing at market interest rates. Rent supplements are furnished directly by contract between FHA and owner-developer for those tenants who qualify under income standards in the federal law.³²

Although these alternatives are also administered by local authorities, the Attorney General of California has given his opinion that they do not require voter approval under Article XXXIV of the California Constitution;³³ leased units and privately-owned houses whose tenants receive rent supplements are not developed, constructed, or acquired by the Housing Authority.

Under Section 236 of the National Housing Act, 12 U.S.C. § 1715 z-1, in 1968 a still newer program of direct interest subsidies to lenders on privately constructed homes is authorized for those families of qualifying low-income, to keep monthly payments for housing, including taxes and insurance, to 25% of income.

The Housing Study for San Jose prepared by Kaiser Engineers (see fn. 17 supra) states (p. VIII-2):

"Most recently the conventional approach has been relegated to the least used and, therefore, lowest priority of all the methods available to a local housing authority. This is true because the conventional approach takes almost twice as long to develop housing than the other methods, it usually results in large monolithic developments so common in the eastern part of the country and known as Public Housing Projects, and it does not make full use of the private sector of the economy."

32. President Johnson has said of these programs:

"The most crucial new instrument in our effort to improve the American city is the rent supplement . . . a program of rent supplements for low-income families . . . provides a brand new approach to meet an ancient and long-neglected need."

HUD, "The Rent Supplement Program for Low Income Families".

"HUD Fiscal year 1971 Budget shows commitment to Housing", HUD News, Feb. 2, 1970 (HUD-No. 70-48), observes (p. 4) that by the end of 1970 approximately 35,800 units will be supported by rent supplements.

33. 47 Ops.Cal.Atty.Gen. 17 (1966).

The Schermer Report to the National Commission on Urban Problems (see fn. 25, *supra*) concluded:

"16. The shelter needs for a large part of the low- and moderate-income population can probably be best served through Federal stimulation of private development on the one hand and a system of Federal cash subsidies to families on the other." (p. viii)

The Report of The President's Committee on Urban Housing, A Decent Home (December 1968), observed (p. 69):

"Full opportunities should be provided under the various programs for the subsidy recipients to own their units, either outright or through cooperatives or condominiums. Many studies have found that ownership is highly correlated with good maintenance and neighborhood stability."

The Constitution is silent on which of these various methods of meeting the need for low-income housing is best. We note the several methods, *not to tender any view of our own that one is better than another, but to say that voters may legitimately think so, wholly divorced from racial prejudices, and it is reasonable to let them be heard at the polls.* Voters may well believe, on grounds unrelated to race or poverty, that other programs are more eligible from the standpoint of public and community interest than a conventional public housing project, and therefore exercise their right under Article XXXIV to disapprove such a project.³⁴ And there is not a scrap of evidence in the record to suggest that reasons of race and poverty have entered into the adoption of Article XXXIV or the action taken by the electorate under it.

34. There were statements in plaintiff's written material below that the leased housing-rent subsidy and the rent supplement programs are not capable of caring for the housing situation in San Jose. There are three answers: (1) The decision goes beyond San Jose; it outlaws Article XXXIV everywhere. (2) If the fact is constitutionally relevant, it should have been subjected to plenary trial, not taken cavalierly on summary judgment. (3) The voters may think differently from officials of the Housing Authority; the "equal protection clause" is not an instrument by which the courts may review and revise the judgment of the electorate.

In sum, Article XXXIV is a wholly neutral provision which bears no resemblance in purpose or effect to the measures struck down in *Reitman v. Mulkey* and *Hunter v. Erickson*.

C. THE EQUAL PROTECTION CLAUSE DOES NOT PRECLUDE REASONABLE CLASSIFICATION. ARTICLE XXXIV MAKES NO CLASSIFICATION ON THE BASIS EITHER OF RACE OR POVERTY.

Classifications based on race are "constitutionally suspect," *Hunter v. Erickson*, 393 U.S. 385, 392 (1969), and cases there cited. There is no such classification here. Apart from racial classification, a state created category is not in violation of the 14th Amendment if any set of facts can be rationally conceived to support it. E.g., *McDonald v. Board of Election*, 394 U.S. 802, 808-09 (1969); *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). One who complains of a violation of the Equal Protection Clause must at least show that someone *comparably situated* has been treated differently. *National Union v. Arnold*, 348 U.S. 37, 41 (1954).

Appellees would place poverty in the same category as race as a suspect classification under the Equal Protection Clause. At this point it is necessary to replace words by thought. While laws may not deprive the poor of basic rights of citizens, such as the right to move from state to state,³⁵ or the right to vote,³⁶ it is a fact of life that indigency is a social, economic and political situation to which government must give its attention, or at least rightfully may do so. And to do so is not to discriminate unconstitutionally. In turning its attention to this subject, a State has wide freedom to determine what it should do and how it should do it. In permitting classification, the Equal Protection Clause allows the law-maker to single out the need to be served or the "evil" to be eradicated and to legislate about *that* need or "evil" without requiring like treatment of other matters outside the area. As

35. *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Edwards v. California*, 314 U.S. 160 (1941).

36. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), the poll tax case.

Mr. Justice Holmes said in *Patson v. Pennsylvania*, 232 U.S. 138, 144 (1914), "A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience."

Directing legislation to the problem of poverty is not classification on the basis of poverty.

Any measure or program for dealing with public welfare assistance raises debatable economic, social, or philosophical problems, and no program may be ideal. But these problems are not solvable by the Constitution, *Dandridge v. Williams*, supra, at 487. "Classification" is not to be measured by an apothecary's scales. *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61, 78.³⁷

Article XXXIV of the California Constitution does *not* in fact make a classification on the basis of poverty. To be sure, it does, by its terms, apply only to a "low rent housing project" "for persons of low income". But to leap from that fact to a conclusion that it classifies people on the basis of poverty is quite impermissible.

With minor exceptions California treats *all* kinds of public housing alike. As stipulated, the only kind of housing any governmental agency in California provides, other than the housing to which Article XXXIV applies, is housing for state officials and university personnel (A. 69, 70).³⁸ Different treatment of housing assistance between employees of the State and all other persons is obviously a permissible classification. In short, Article XXXIV requires voter approval for *all* public housing projects sponsored

37. On this very principle the Supreme Court of California upheld the Unruh Act's prohibition of racial discrimination in the sale and rental of certain but not all kinds of property, *Burks v. Poppy Construction Co.*, 57 C.2d 463, 370 P.2d 313. Said it: "A statute need not operate uniformly with respect to persons or things which differ in relevant aspects, and a classification will be upheld where it has a substantial relation to a legitimate object to be accomplished." (p. 475)

38. Another category consists of houses acquired as an incident to the exercise of eminent domain, which the public authority disposes of as rapidly as it can—obviously a peculiar category all its own.

by the State or its agencies and makes no classification of people for that purpose on any basis.

To say that Article XXXIV discriminates on the basis of poverty *because its subject matter is housing for persons of low income* simply ignores the fact that the only concern the State has with supplying housing is to supply it to persons of low income. There may be a *moral* duty to provide housing for those economically disadvantaged, or it may be prudent to do so so as a prophylactic against social upheaval. But the Constitution imposes no command to do so, and therefore the Constitution imposes no command as to how the State is to go about determining when and if it shall do so. The subject of publicly supported housing is a subject by itself, and of its very nature it concerns those of low income.

The Equal Protection Clause does not even begin to be involved in a situation unless the State enactment actually classifies people and treats them differently. When the State Act does not do that but, instead, only focuses on one problem there is no equal protection question. The venerable case of *Barbier v. Connolly*, 113 U.S. 27, 32 (1885) says this:

"Class legislation, discriminating against some and favoring others, is prohibited, *but legislation which, in carrying out a public purpose, is limited in its application*, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

at least D. BECAUSE THERE IS NO CLAIM OF DISCRIMINATION WITHIN THE AREA OF HOUSING AND NO GROUP IS TREATED DIFFERENTLY FROM ANY OTHER WITH RESPECT TO HOUSING, THE DISTRICT COURT HAD TO POSIT A ~~CONTRAST~~ WITH OTHER FEDERAL AID PROGRAMS—SPECIFICALLY, HIGHWAYS, URBAN RENEWAL, HOSPITALS, EDUCATION, LAW ENFORCEMENT ASSISTANCE, AND MODEL CITIES. THAT CONTRAST IS SPECIOUS, SUPERFICIAL, AND BARE ASSERTION.

There is no claim that others are treated better than the poor with respect to public housing. It was stipulated that housing for rental to persons of low income is the only kind of public housing in California, except for homes for state officials and the like

(p. 44, *supra*). In order to find some basis for a claim of unequal protection, it was necessary to look elsewhere.

The core of the decision below appears to be the assertion (A. 176) that Article XXXIV makes it more difficult to obtain federal aid for housing than for highways, urban renewal, hospitals, education, law enforcement assistance, and model cities. It would seem that the assault on Article XXXIV as unconstitutional was first reached and then followed by a hasty casting-about to find something against which to measure inequality of treatment. The contrast is simply not well made.

In the first place, classification of housing different from the matters referred to may be a classification different in kinds of public expenditure, but it is no distinction based on any forbidden criterion.

In the second place, the reference to other federal aid is a cursory one without citation of statutes and without a word in the record showing what the other programs may be, when they came into being, how they operate, what aid the federal government offers, or how or when California has responded to the offers of aid. There is not a word of analysis to show such likeness in any rational aspect as to require identity of treatment. If a declaration of unconstitutionality is to be based on such matters, it would seem plainly necessary to explore the nature of these things as a basis for comparison. The opinion contains no such exploration. But lack of similarity in vital respects is plain on the face of the relevant statutes upon any inspection.

To review the various federal assistance programs in detail would be endlessly tedious. They vary so widely that the Congress itself could be accused of "unequal protection", in violation of the 5th Amendment,³⁹ in its offers of assistance were there any merit in the effort to import "unequal protection" into the subject.

39. The 5th Amendment imposes the same equal protection constraints on the federal government as the 14th Amendment imposes on the States, *Bolling v. Sharpe*, 347 U.S. 497 (1954).

Most of the federal-aid programs referred to in the opinion of the court below *did not even exist until after Article XXXIV was adopted—most of them long after*. They were created by Congress later—highways, 1958⁴⁰; some of the hospital aid, 1963⁴¹; education, 1965⁴²; law enforcement, 1968⁴³; model cities, 1966⁴⁴. Only some partial provision for aid to urban renewal⁴⁵ and for some to hospitals⁴⁶ antedates the adoption of Article XXXIV. If a state statute or constitutional provision which does *not* deny equal protection when adopted, *because at that time nothing exists against which it can be said to discriminate*, how can it be rendered unconstitutional because the federal government later creates new programs of assistance and offers them to the states or the state later first provides for response to the offer? In *Carter v. Jury Commission*, 396 U.S. 320 (1970), rejecting a claim of unequal protection, the Court said (p. 336):

"Its antecedents are of ancient vintage, and there is no suggestion that the law was originally adopted or subsequently carried forward for the purpose of fostering racial discrimination."

40. Federal-Aid Highway Act, 23 U.S.C. § 101 et seq., as amended Pub. Law 85-767, 72 Stat. 885.

41. Mental Retardation Facilities Construction Act, 42 U.S.C. § 2661 et seq.

42. Higher Education Act of 1965, 20 U.S.C., 1001 et seq.; Assistance to Local Educational Agencies for the Education of Children of Low Income Families, 20 U.S.C. § 241a et seq.; Grants to Strengthen State Departments of Education, 20 U.S.C. § 861 et seq.

43. Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3711.

44. Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. § 3301 et seq.

45. Housing Act of 1949, 42 U.S.C. § 1450, 63 Stat. 413, Act of July 15, 1949. Not until 1954 was the subchapter on urban renewal added, Act of Aug. 2, 1954 c. 649; 42 U.S.C. § 1450.

46. 42 U.S.C. § 291 et seq., based on Act of Aug. 13, 1946, c. 958, § 2, 60 stat. 1041.

Urban renewal may be disposed of briefly. Not until 1951—the year after Article XXXIV was adopted—did California even adopt legislation responding to the federal offer (Community Redevelopment Law, Stats. 1951, ch. 710). The problems of urban renewal are so peculiar and complex that California's participation takes 110 pages in its statutes to describe and regulate (Cal. Health Safety Code, §§ 33,000 to 34,014).

The court below was grossly misled in assuming that urban renewal is free of voter control. The federal statute itself requires approval "by resolution or ordinance of the governing bodies of the affected communities" (20 U.S.C. §§ 1451(b), 1455). Urban renewal in a local community is carried out by a local redevelopment agency, which must be created by the local legislative body. To that end there must be a declaration by that legislative body that a redevelopment agency is needed. Cal.H.&S. Code § 33,101 specifically provides that the ordinance of the local legislative body "declaring that there is need for an agency to function in the community shall be *subject to referendum* as prescribed by law for a county or city ordinance." (H.&S. Code, § 33,101). *Thus the local electorate does have its voice.* The agency must prepare a redevelopment plan, and this must be approved by ordinance of the local legislative body (H.&S. Code § 33,365); if the plan requires an expenditure of money, the ordinance must provide for it (H.&S. Code § 33,369). All these determinations are "legislative", *Hunter v. Adams*, 180 Cal.App.2d 511, 517; 4 Cal. Rptr. 776 (1960). Therefore they are subject to referendum under California Constitution, Article IV, § 1. The "community" may raise funds by general obligation bonds to finance the redevelopment (H.&S. Code §§ 33,630 and 33,621), but all such bond issues are expressly required to have voter approval, for H.&S. Code § 33,633 prescribes that they are subjected to all requirements and limitations "provided by law or the charter of the

community for the issuance and authorization of such bonds for public purposes generally." This plainly subjects them to Cal. Const. Art. XI, § 18.⁴⁷ If the redevelopment agency issues bonds or borrows money itself, the debt is no charge on, or liability of, the community or burden on the taxpayer (H.&S. Code § 33,644). A plan for "special renewal areas" must have the consent of 60% or more of the persons owning real property in the area (H.&S. Code § 33,717(1)). Thus reference to urban renewal as support for the decision below completely collapses, because local participation in urban renewal is as much subject to voter approval as is low-income housing.

Moreover, the court below tacitly made an unsupported and erroneous assumption that no referendum process exists as to the several aid programs adverted to by it (A. 176-7). California has general referendum procedure for all legislation (see p. 6 *supra*), and Article XXXIV of its Constitution came into being because the California Supreme Court held that decisions relating to low-income housing are "administrative" not "legislative". The opinion below cites no basis for supposing (and we know of none) that the general referendum laws and voter approval requirements do not apply to the other aid programs in vital nodes. For example, in response to the federal offer of aid for model cities, California has merely by a short act authorized cities and counties to participate in the federal program (Government Code § 53,703), and all acts of the cities and counties are, of course, subject to Art. IV, § 1, and Art. XI, § 18 of the California Constitution.

The contrast with federal aid for highways is equally inept. One of the prime motives underlying Article XXXIV was the

47. Article XI, Section 18 in fact requires a two-thirds vote. In *Westbrook v. Mibaly, as Registrar of Voters*, 2 Cal.3d 765 (June 30, 1970), the Supreme Court of California held that the requirement of a two-thirds vote instead of a majority violated equal protection, but the requirement of voter approval by majority vote stands.

protection of the *local* taxpayer and the preservation of *local* fiscal responsibility. But in California highway programs do *not* involve the local purse; they are borne by the state treasury. The Federal-Aid Highway Act, 23 U.S.C. §§ 101 et seq., as amended (Pub.Law 85-767, 72 Stat. 885), provides for three basic programs, primary systems, secondary systems, and the interstate system (23 U.S.C. § 103(a)). At the state level, the program is handled by a State Highway Department (23 U.S.C. § 105). Only the secondary system could involve local officials, and, even then, not where all public roads are under control of a State Highway Department (§ 105b). In California, under the Secondary Highways Act of 1951 (Cal. Streets & Highways Code, §§ 2200 et seq.), all matching funds for federal aid for secondary systems and county highways come from state sources (§§ 2201, 2210.5). That Act declares, "Inasmuch as these county highways are a matter of state concern and many of the counties are financially unable to furnish funds to be used with federal funds as required by federal law, funds should be provided from state sources therefor" (§ 2201).⁴⁸

The principal form of federal aid to higher education is that authorized by 20 U.S.C., Ch. 28. State participation requires creation or designation of a central state agency (20 U.S.C. § 1005), and we find nothing in California statutes requiring local governmental agencies to share the expense of federally-aided programs.

48. By Stats. of 1969, Ch. 1141, adopted in 1969 after this suit was filed, California adopted the *Urban Area Traffic Operations Improvement Act* (St. & H. Code § 2300 et seq.) to take advantage of 23 U.S.C. § 135 which appropriates federal aid for the relief of congested city streets and county roads. But the federal funds in this program go into the State Highway Fund and are apportioned by the State Highway Department; while counties and cities may have to supply some funds, those funds essentially are taken from moneys first supplied by the state from state taxation (St. & H. Code, § 2324).

As to law enforcement assistance, California has yet to enact legislation governing the manner in which California or its localities may respond to the federal offer of aid.⁴⁹

Indeed, every one of the programs referred to in the opinion below differs sharply from low-income housing aid, because they raise none of the political, sociological or environmental questions that such housing does. Federal aid to hospitals (42 U.S.C. § 291 et seq. and 2661 et seq.) requires a central state agency to administer (in California the State Department of Public Health, Cal. H. & S. Code, § 430 et seq.) and involves relatively small sums, and California puts up matching sums from the state treasury (Cal. H. & S. Code, § 435.6). While the local community defrays some of the costs, it is inconceivable how anyone could find sociological or political objections to better hospitals! Hospitals serve no "group"; they serve the whole public. Indeed, the federal act declares that its purpose is "to assist the several States * * * to furnish adequate hospital, clinic, or similar services *to all their people.*" (42 U.S.C. § 291(a)) If any group is more advantaged than another, it is the "poor"; and it cannot be said that California discriminates against the poor because it furnishes some services to them more readily than it supplies them with others.

Similarly, when the federal Student Assistance Program states (20 U.S.C. § 1061a) that the purpose of "educational opportunity grants" is "to assist in making available the benefits of higher education to qualified high school graduates of exceptional financial need, who for lack of financial means of their own or of their families would be unable to obtain such benefits without such aid", it is the "poor" who are aided. Again, the federal Act for "Assistance to Local Educational Agencies for the Education of Children of Low-Income-Families" states (20 U.S.C. § 241a) that

49. In 1967, before Congress legislated but anticipating that it might, California created a Council on Criminal Justice in the state government to develop plans to fulfill the requirements of any federal act (Stats. 1967, c. 1661, p. 4042; Penal Code, §§ 13,800-13,807). Nothing in this Act exempts anything from Art. IV, Sec. 1 or Art. XI, Sec. 18 of the State Constitution.

it is in "recognition of the special educational needs of children of low-income families" that "Congress hereby declares it to be the policy of the United States to provide financial assistance * * * to local educational agencies serving areas with concentrations of children from low-income families * * *." That, too, is a program for the "poor".

This last term the Court rejected the claim that exemption of church property from taxation (along with non-profit hospitals, art galleries and libraries) violated the Establishment Clause of the First Amendment. *Walz v. Tax Commission*, 397 U.S. 664 (1970). There is no report of any contention by the appellant, a private owner of real estate, that the tax exemption violated the Equal Protection Clause by classifying him differently from the exempted non-profit organizations. But this Court would have been alert to that constitutional bar if it had existed, and we submit that the classification here is no less permissible than in the *Walz* case. Highways, colleges and law enforcement are so vastly different problems from public housing that these plaintiffs cannot be said to be "comparably situated" to highway users, etc.

E. THE VERY FEDERAL LEGISLATION WHICH LED TO ARTICLE XXXIV ILLUMINATES THE RATIONALITY OF THE CLASSIFICATION

Article XXXIV is a response to the invitation of the Housing Act of 1937.⁵⁰ That Act extends an invitation to the States to employ the funds and credit of the United States to bear some of the cost of alleviating housing shortages. The Act several times emphasizes that *local control* is its keynote policy. §§ 1, 15(7) (a, b), 42 U.S.C. §§ 1401, 1415(7) (a, b). Thus the United States Housing Authority may not enter into a contract for preliminary loan "unless the governing body of the locality involved has by resolution approved the application . . ." (§ 15(7) (a)) or into a contract for any other loan "unless the governing body of the

50. Act of Sept. 1, 1937, c. 896, 50 Stat. 888, as amended, 63 Stat. 422, 429, 73 Stat. 679, 82 Stat. 504; 42 U.S.C. §§ 1401, et seq.

locality has entered into an agreement . . . for . . . local cooperation . . ." (§ 15(7)(b)). All this is required "[i]n recognition that there should be local determination of the need for low-rent housing. . . ." 42 U.S.C. § 1415(7). In 1959, Section 1 of the Act (42 U.S.C. § 1401) was amended to state:

"It is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program * * *" (Act of Sept. 23, 1959, Pub.L. 86-372, Title V, § 501; 73 Stat. 679)

Where control is to be local, where federal law emphasizes that desideratum, where the basic criterion is that there be "local determination of the need for low-rent housing" before such housing may be brought into a community and a major part of the cost be placed on the community, what more appropriate or permissible than that the voice of that local determination be the people themselves?

As we have seen (pp. 7, 8, *supra*), just 8 months after California adopted Article XXXIV in 1950, Congress provided in 1951 in the Independent Offices Appropriation Act that the United States Housing Authority "*shall not . . . authorize the construction of any projects*" in any locality in which the project may be "*rejected by the governing body of the locality or by public vote*". Congress repeated this prohibition in the Independent Offices Appropriation Act enacted in 1952. By the Independent Offices Appropriation Act enacted in 1953, it specified that no housing should be authorized, nor any authorized go forward, "where the people of that community, by their duly elected representatives, *or by referendum*, have indicated they do not want it."

Although these Congressional restraints were not repeated after 1953 and are not now part of the Congressional enactment, we submit that they plainly demonstrate the rationality of placing low cost housing in a category of its own peculiarly justifying a requirement of voter approval. *The closer a subdivision of the*

government gets to the grass roots, the more reasonable is a classification requiring voter approval, as witness the colonial New England town meeting.

F. THE PURPOSE AND EFFECT OF ARTICLE XXXIV ARE TO DETERMINE HOW STATE POWER SHALL BE DISTRIBUTED BY CALIFORNIA AMONG ITS OWN GOVERNMENTAL ORGANS. SUCH A PROVISION PRESENTS NO QUESTION JUSTICIABLE IN A FEDERAL COURT

Since motive and purpose of both the adoption of Article XXXIV and of voter action under it are immune from question, the appellees' case comes down to the bare claim that it is unconstitutional to require voter approval at all! And since Article XXXIV treats alike all who come within its subject matter, the claim further reduces itself to the contention that Article XXXIV is unconstitutional because, supposititiously, *some* kinds of federal aid, irrespective of magnitude or burden on the public, may be obtained without public vote. This kind of attack is simply an assault on a structure of government, an insistence that the equal protection clause forbids a State from requiring voter approval of anything unless it requires voter approval of *everything*! We submit that the contention is not merely erroneous, it is fantastic.

The federal Housing Act of 1937 was an invitation to the State to employ federal assistance upon *local determination* of its need (see pp. 53, 54 *supra*). California accepted that invitation. In doing so, it assumed that the determinations of its agencies were subject to review and veto by the people, under its all-pervasive referendum procedure. When it was informed otherwise by its Supreme Court and learned of loopholes (see pp. 6, 8-11, 34, 36 *supra*), it hastened to correct its distribution of the exercise of state sovereignty. It did so because the burden financially and environmentally falls on the local citizens. Therefore, by Article XXXIV of the Constitution, California now and since 1950 accepts the invitation of federal aid only on the basis that the *people themselves* determine the need and the desirability for low-

rent housing in their communities. That determination by California does not implicate the Constitution of the United States in any manner. The sovereignty of a State rests in its people. The manner in which they distribute or parcel out its exercise is not a federal justiciable question. *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937); *Hughes v. Superior Court*, 339 U.S. 460, 466-67 (1950). They may retain all or any part of it in their own hands, as by the initiative or referendum. *Pacific Tel. Co. v. Oregon*, 223 U.S. 118 (1912). Granting some or all of that exercise of sovereignty to legislative bodies, state or local, they may retain or resume the remainder. As this Court said in *Highland Farms Dairy v. Agnew*, supra, at 612:

"The Constitution of the United States in the circumstances here exhibited has no voice upon the subject. The statute challenged as invalid is one adopted by a state. . . . How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."

And this is true even should it be true that, in practice, the State's decision may make it more difficult for any particular group within the State to obtain the advantages it desires, so long as the decision is grounded in neutral principle, as is Article XXXIV. *Hunter v. Erickson*, 393 U.S. 385 (1969). True, *Hunter v. Erickson* tells us that a "legislative structure which otherwise would violate the Fourteenth Amendment" is not immunized by popular referendum (p. 392). But that is not this case. *Here it is not claimed that anything violates the Fourteenth Amendment except the provision for referendum itself!* *Hunter v. Erickson* also reminds us of what no reminder should have been necessary, that the "sovereignty of the people is itself subject" to constitutional limitations on the State. That principle, as *Hunter v. Erickson* itself applies it, reaches a rearrangement of the distribution of legislative powers on racially discriminatory lines. That is not this case either.

The subject matter of "equal protection" is the impact of the law on the citizenry. The question it asks is whether an enactment lays the lash differently on the back of one citizen than on that of another or hands privileges to one that it withholds from another, both in like position vis-a-vis criteria the law recognizes. (Race and color are not valid criteria.) But the court below has *shifted to a radically different type of inquiry entirely*. Its phrasing is that "the state cannot make it more difficult to enact legislation on behalf of one group than on behalf of others" (A. 174). Thus it divides society into pressure groups, each seeking advantages for itself from the government, and it asks whether the machinery of government makes it more difficult for one group to obtain advantages than another. We need not ask, in this case, whether this mode of examination is ever permissible. (It may be, for example, if a state constitution required a two-thirds vote to enact any laws the effect of which was to benefit Negroes as such.) But the inquiry is so different that courts, we submit, should answer it with caution if they ask it at all. By its very nature the democratic process makes it less possible for small groups to obtain their wishes than large, because there are fewer voters. A voting system necessarily affords a relatively weaker position to a small group than to a large, unless the members of the smaller group are given multiple votes in defiance of the one man-one vote requirement of equal protection. The smaller group is not thereby denied equal protection. On the contrary, "equal protection" as taught in the one-man one-vote cases forbids concern with voting power of "groups". "Citizens, not history or economic interests, cast votes", *Reynolds v. Sims*, 377 U.S. 533, 580 (1964). "Equal protection" concerns itself with individuals, not groups, *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948). Beyond that, the democratic process is not one of scientific precision. And no one, either politician, professor, philosopher or jurist, possesses the wisdom to make it so. As said by Mr. Justice Douglas for a unanimous court in *Sailors v. Kent Board of Education*, 387 U.S. 105, 109:

"The science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment."

The democratic process lives and grows by day-to-day experience and experiment. Justice Brandeis stood firmly against use of the 14th Amendment to invalidate state legislation, because he perceived that the states are laboratories of experimentation, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932). And this Court renewed its attachment to that principle, in *Sailors v. Kent Board of Education*, *supra*, when it reaffirmed (p. 109),

"... the state legislatures have constitutional authority to experiment with new techniques'.

* * *

"Save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs."

The course of the democratic political process is for the people to become aroused about *particular* abuses, not about theoretical wholes that lawyers and judges might later construct. The decision below rests on a notion that would tie the hands of the voters. They would be given but two choices, either not to act at all when an abuse comes to their attention or else to devise an all-inclusive body of regulation that would cover all possible situations that acute minds might later think to be similar.

If the equal protection clause permits inquiry into whether the machinery of government makes it more difficult for one "group" to obtain advantages than another, such an inquiry should require a specific pin-pointing of "groups" supposed to be better advantaged. The court below has wholly failed in this respect. Relative

to low-income housing it *constructs* a group called "the poor". But what group is advantaged by "highways", "hospitals", "education", "law enforcement", or "urban renewal"? The answer is: no "group". It is the *whole* of society, the whole of the body politic, that is benefited, and each of these subject matters possesses characteristics entirely different from low-income housing. Moreover, it is an astigmatized vision that sees low-income housing as designed to aid a "group" called "the poor". The constitutionality of low-income housing and urban renewal has been upheld because they serve a public purpose by serving the whole social fabric. *Berman v. Parker*, 348 U.S. 26 (1954); *Housing Authority v. Dockweiler*, 14 Cal.2d 447, 94 P.2d 794 (1939); *Redevelopment Agency v. Hayes*, 122 Cal.App.2d 777, 266 P.2d 105 (1954), cert. denied *sub. nom. Van Hoff v. Redevelopment Agency*, 348 U.S. 897 (1954). Low-income housing is provided by California because it benefits the whole of the social organism, and it does so in respects quite different from "highways", "hospitals", "education", "law enforcement", etc. Consequently, a different way of handling it denies equal protection to no one.

In three recent cases Courts of Appeals have been called upon to consider state referendum statutes which came far closer than does Article XXXIV to violating the principles of *Hunter v. Erickson* and *Reitman v. Mulkey*. In each case the State's decision to submit a proposal to referendum was upheld against a charge of violation of Equal Protection. *Spaulding v. Blair*, 403 F.2d 862 (4th Cir. 1968); *Ranjel v. City of Lansing*, 417 F.2d 321 (6th Cir. 1969), cert. denied 397 U.S. 980; *Southern Alameda Spanish Speaking org. v. City of Union City, Cal.*, 424 F.2d 291 (9 Cir. 1970).

In *Spaulding v. Blair*, plaintiffs were Negroes who sought to prevent the submission of an open-housing amendment to referendum. Speaking for the court, Judge Sobeloff said, 403 F.2d at 864,

"No contention is made that a state may not constitutionally apportion its legislative power between elected rep-

representatives of the people and the people themselves. Nor is it suggested that Chapter 385, if approved by the voters, would be unconstitutional. In these circumstances, it must be concluded that a federal court is without power to enjoin a valid state legislative procedure."

In the *Ranjel* case, there was a petition for a referendum upon an ordinance rezoning a 20-acre site from one-family residential to a community unit plan, which would permit the construction of 250 low-rent housing units by a private developer using HUD funds. The plaintiffs, poor black and Mexican-Americans, sought to enjoin the referendum. The District Court granted an injunction. Citing *Hunter v. Erickson*, *Reitman v. Mulkey*, and *Spaulding v. Blair*, the Court of Appeals reversed. It said, 417 F.2d at 324,

"Initiative and referendum is an important part of the state's legislative process. Being founded on neutral principles, it should be exempt from Federal Court constraints."

In *Southern Alameda Span. Spg. Org. v. City of Union City, Cal.*, 424 F.2d 291 (1970), the plaintiff "was successful in obtaining the passage of a city ordinance rezoning a tract of land within Union City, California, to a multi-family residential category in order to permit the construction of a federally financed housing project for low and moderate income families. The ordinance was nullified almost immediately by a city-wide referendum." Plaintiff attacked the referendum and its results "as infringing upon their constitutional rights under the due process and equal protection clauses of the Fourteenth Amendment." Plaintiff appealed from refusal to convene a three-judge court and refusal to order the zoning changes into effect. The Ninth Circuit affirmed, saying (p. 294):

"A referendum, however, is far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters—an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what

serves the public interest. See *Spaulding v. Blair*, 403 F.2d 862 (4th Cir. 1968). This question lay at the heart of the proposition put to the voters. That some voters individually may have failed to meet their responsibilities as legislators to vote wisely and unselfishly cannot alter the result.

* * *

"Many environmental and social values are involved in a determination of how land would best be used in the public interest. The choice of the voters of Union City is not lacking in support in this regard."

These, we submit, are the principles that control this case. They were completely overlooked by the court below.

The plaintiffs' case here is a stupefying reversal of history. The initiative and referendum were born of an urge to curb the power of the wealthy and entrenched so as to benefit the disadvantaged. Yet, now, they are attacked and enjoined as working to the disadvantage of the disadvantaged! To embark on the task of analyzing different forms of governmental structure to the end of determining which is more likely to be equally attuned to the demands or needs of all the groups in which the citizenry falls—and in one way or another everyone is a member of some minority—would call for divine wisdom. For a court to embark on that task and to utilize the 14th Amendment to redistribute the legislative powers of a state on the basis that a different allocation would better serve this or that minority group is to open up an unpredictable future. Today taxpayers in revolt may vote down bond issues that a timorous city council, subjected to the "confrontation" of pressure groups, would vote. Tomorrow legislative bodies may stand in the way of measures for which today's youth, then grown to maturity, will vote behind the privacy of the curtain of the polling booth. The Equal Protection Clause has been invoked and applied to protect and expand the people's right to vote, *Reynolds v. Sims*, 377 U.S. 533 (1964); *Harper v. Virginia Board of Elections*, 383 U.S. 633 (1969); now

it has been invoked and applied below to deny the right to vote. This, we submit, is a misapplication.

We return to the language of the Equal Protection Clause of the 14th Amendment:

"No state * * * shall * * * deny to any person within its jurisdiction the equal protection of the laws."

As a matter of explicit English direction, this prescribes that, regardless of who makes the law, it shall operate alike on all in like situation. It asserts nothing about how laws shall be made unless the very manner of their making *indubitably and inevitably* works a discrimination in their operation or is intended to do so. *That is not this case.*

When low rent housing first originated in the 1930's, and it was feared that courts would strike down enabling legislation, Mr. E. H. Foley, Jr., Director of the legal Division of the Federal Emergency Administration of Public Works, wrote in "Low Rent Housing and State Financing", 85 University of Pennsylvania Law Review, 239, 259 (1937):

"But whatever the conflict may be as to the wisdom of state action in the housing field, it is submitted that this conflict presents a legislative rather than a judicial question. It is not for judges to strike down legislation simply because it does not conform with their own social or economic predelictions."

We submit that this observation is as true now as it was then, when the threat came from the other end of the spectrum.

CONCLUSION

We submit that a respectful regard for the American federal system—for the unique relationship between the federal authority and state authority—should not countenance the kind of summary disposition this case received below. The acknowledged paramountcy of the federal authority is universally accepted be-

cause it is sensitively applied and exercises "scrupulous regard for the rightful independence of the state governments". *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 501 (1941).

We respectfully submit that the judgment should be reversed with direction to dismiss the complaint.

Dated, San Francisco, California, August 11, 1970.

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OCT 26 1970

IN THE
Supreme Court of the United States

E. ROBERT SEAYER,

OCTOBER TERM, 1970

No. 154

RONALD JAMES, ET AL.,

Appellants,

—v.—

ANITA VALTIERRA, ET AL.,

Appellees.

No. 226

VIRGINIA C. SHAFFER,

Appellant,

—v.—

ANITA VALTIERRA, ET AL.,

Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF APPELLEES ANITA VALTIERRA, ET AL.

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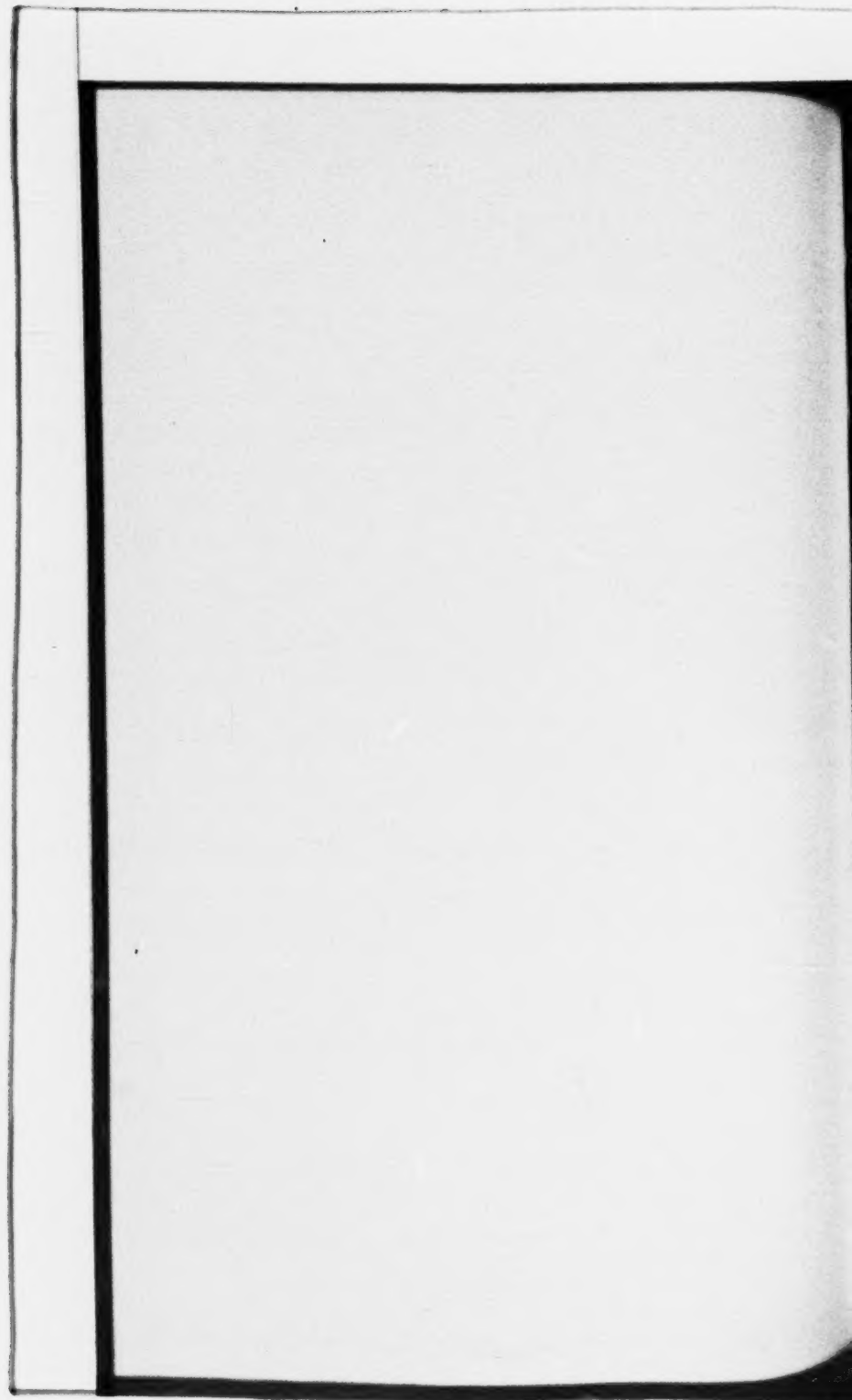
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1970

No. 154

RONALD JAMES, ET AL.,

Appellants,

—v.—

ANITA VALTIERRA, ET AL.,

Appellees.

No. 226

VIRGINIA C. SHAFFER,

Appellant,

—v.—

ANITA VALTIERRA, ET AL.,

Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF APPELLEES ANITA VALTIERRA, ET AL.

OPINION BELOW

The opinion of the three-judge district court is reported at 313 F. Supp. 1, and appears in the Appendix [hereafter cited A.] at A. 168-177. Its judgment appears at A. 178-179.

JURISDICTION

The jurisdiction of the district court was sustained by 28 U.S.C. § 1343(3), (4), since plaintiffs-appellees charged that Article 34* of the California Constitution deprived them of rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment. *See* Rev. Stat. § 1979, 42 U.S.C. § 1983. Because they requested an injunction against the

*For ease in reading, we use arabic rather than roman numerals to designate frequently cited Articles of the California Constitution.

enforcement of that Article of the ground of its inconsistency with the Fourteenth Amendment, a three-judge district court was required by 28 U.S.C. § 2281. *A.F.L. v. Watson*, 327 U.S. 582 (1946). The jurisdiction of this Court on direct appeal from the final judgment granting the injunction rests upon 28 U.S.C. § 1253. *Shapiro v. Thompson*, 394 U.S. 618 (1969).¹

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. The case involves Article 34 of the Constitution of the State of California, which reads as follows:

Article XXXIV of the Constitution of California

§ 1. Approval of electors; definitions

Section 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

For the purposes of this article the term 'low-rent housing project' shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the

1. Plaintiffs-appellees prevailed below on their Equal Protection claim. They also urge, as an alternative ground for affirmance, that Article 34 violates the Supremacy Clause, Art. VI, cl. 2, of the Constitution of the United States, and the United States Housing Act of 1937, 42 U.S.C. §§ 1401 *et seq.* This claim was made below (A. 12, 93); the district court's jurisdiction to entertain it was pendent to its jurisdiction of the Equal Protection claim, *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959); and, by reason of the inclusion of the Equal Protection claim in the complaints, a three-judge court was required to hear it. *Florida Lime & Avocado Growers v. Jacobsen*, 362 U.S. 73 (1960).

Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. For the purposes of this article only there shall be excluded from the term 'low-rent housing project, any such project where there shall be in existence on the effective date hereof, a contract for financial assistance between any state public body and the Federal Government in respect to such project.

For the purposes of this article only 'persons of low income' shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

For the purposes of this article the term 'state public body' shall mean this State, or any city, city and county, county, district, authority, agency, or any other subdivision or public body of this State.

For the purposes of this article the term 'Federal Government' shall mean the United States of America, or any agency or instrumentality, corporate or otherwise, of the United States of America. (Added Nov. 7, 1950.)

§ 2. Self-executing provisions

Sec. 2. The provisions of this article shall be self-executing but legislation not in conflict herewith may be enacted to facilitate its operation. (Added Nov. 7, 1950.)

§ 3. Partial validity

Sec. 3. If any portion, section or clause of this article, or the application thereof to any person or circumstance, shall for any reason be declared unconstitutional or held invalid, the remainder of this article, or the application of such portion, section or clause to other persons or circumstances, shall not be affected thereby. (Added Nov. 7, 1950.)

§ 4. Conflicting provisions superseded

Sec. 4. The provisions of this article shall supersede all provisions of this Constitution and laws enacted thereunder in conflict therewith. (Added Nov. 7, 1950.)

B. The case involves the sections of the United States Housing of Act 1937 that are codified as 42 U.S.C. §§ 1401, 1410(h), 1415(7), and the sections of the California Housing Authorities Law that are codified as Cal. Health and Safety Code §§ 34200, 34201, 34240, 34313, 34353. These sections are set out in the Appendix to this Brief, pp. 1-6 *infra*.

C. The case also involves the Equal Protection Clause of the Fourteenth Amendment, and the Supremacy Clause, Art. VI, cl. 2, of the Constitution of the United States.

QUESTIONS PRESENTED

Article 34 of the California Constitution requires approval by local referendum as the precondition of each specific project for the construction of federally funded public housing for persons of low income. By the express terms of Article 34, only *low-income* housing is subject to this requirement—a requirement which is substantially more onerous than the legislative or administrative processes by which all other similar decisions are made under California law.

I. Does Article 34 violate the Equal Protection Clause of the Fourteenth Amendment, either by denying ordinary law-making process to the poor or by authorizing and encouraging racial discrimination in access to federal benefits?

II: Does Article 34 violate the Supremacy Clause by imposing conditions upon the administration of federal housing programs that are inconsistent with the procedures specified by the United States Housing Act of 1937 and frustrate the purposes of that Act?

STATEMENT OF THE CASE**A. Nature of the Case**

Article 34 of the California Constitution prohibits the development or construction of federally funded public housing for persons of low income unless affirmative approval is obtained for each specific housing project by local popular referendum. The three-judge district court below unanimously held this referendum requirement unconstitutional as an invidious discrimination against the poor and racial minorities, in violation of the Equal Protection Clause of the Fourteenth Amendment.

Appellees (plaintiffs below) are poor persons who have been declared eligible and placed on the waiting lists for public housing in two adjoining California counties.² If public housing were available for them, they could secure decent, safe and sanitary housing at considerably lower rentals than they now pay to live in rank, infested, dangerous and overcrowded hovels. The United States Housing Act of 1937 provides a means for the construction of decent, safe and sanitary low-rent public housing entirely through the use of federal funds. But no such low-income public housing has been constructed in either county during the past twenty years.³ Public housing projects proposed by their respective local Housing Authorities have been defeated at the referendum elections required by Article 34. Shackled by the referendum requirement, the local Housing Authorities are

2. The statement in the text describes 39 of the 41 named appellees, that is, six of seven families. The seventh family was awaiting an interview to determine eligibility at the time the suit was filed. See p. 22 *infra*.

3. There are 50 non-federal units of housing for the elderly in Half Moon Bay, San Mateo County. See p. 24 n. 18 *infra*. (And although the following fact is not reflected in the record, we have lately learned—we feel obliged to mention—that there are 40 federally funded low-rent units in San Mateo County. These were constructed by the Housing Authority of South San Francisco in 1941, prior to the advent of Article 34.)

unable to proceed with any planning for the construction of low-income public housing despite the recognized and urgent need. Thousands of poor families continue to fill the waiting lists for non-existent public housing while they live under intolerable conditions that the Housing Act of 1937 was designed to remedy.

Faced with this stalemate, appellees instituted the present class actions in the United States District Court for the Northern District of California, seeking declarations of the unconstitutionality of Article 34 and injunctions restraining its enforcement. Two suits were filed, one affecting the City of San Jose in Santa Clara County, the other affecting neighboring San Mateo County. The district court, consolidating the suits for all purposes, gave judgment for appellees. Defendants-appellants James et al., members of the City Council of San Jose, appealed to this Court. (No. 154.) One San Jose City Councilwoman, Virginia Shaffer, took a separate appeal from the same judgment. (No. 226.)⁴

B. Legal Background

1. THE UNITED STATES HOUSING ACT OF 1937 AND ITS IMPLEMENTATION IN THE STATE OF CALIFORNIA

By the United States Housing Act of 1937 (42 U.S.C. §§ 1401 *et seq.*), Congress provided a means to furnish decent, safe and sanitary housing for persons otherwise too poor to afford it:

It is hereby declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this Chapter, to assist the several States and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and the acute

4. The defendants sued in the companion San Mateo case have not appealed from the district court's judgment.

shortage of decent, safe, and sanitary dwellings for families of low income, in urban, rural, nonfarm, and Indian areas, that are injurious to the health, safety, and morals of the citizens of the Nation. (42 U.S.C. § 1401.)

Recognizing that economic factors affecting home building had operated, and would continue to operate, to prevent private construction of an adequate supply of housing to meet the needs of low-income persons,⁵ the Housing Act authorized the use of federal funds for the construction of public housing projects (42 U.S.C. § 1409 - § 1411).⁶ Pursuant to these sec-

5. See 42 U.S.C. § 1415(7) (a) (ii). The legislative history of the Act indicates Congress was aware that private enterprise could not construct safe and sanitary housing at low enough cost to enable it to rent or sell such housing to the families of low income who would be served by the housing financed by this bill. H. Rep. No. 1545, of the House Comm. on Banking and Currency, 75th Cong., 1st Sess., on the United States Housing Act of 1937 (August 13, 1937), 1.

6. Apart from direct construction provided for by these sections, a 1965 amendment to the Act provided for a "supplementary form of low-rent housing which will aid in assuring a decent place to live for every citizen and promote efficiency and economy in the program under this chapter by taking full advantage of vacancies or potential vacancies in the private housing market," in areas where such vacancies do exist, by a leased-housing program (42 U.S.C. § 1421b(a) (1)). Under the leased-housing program, the local Housing Authority leases privately owned dwelling units from lessors who are willing to enter into such leases at rental levels not in excess of a maximum figure prescribed by federal law; the Authority subleases the dwellings to eligible low-income persons, who pay the Authority lesser rental amounts also fixed by federal law. (See the 1969 amendment to the Act which provides that rent shall not exceed one-fourth of the family's income (42 U.S.C. § 1402(1)); the difference between the rent paid by the tenant to the Authority and the rent paid by the Authority to the landlord is supplied by federal funds (42 U.S.C. §§ 1421b(e)); See, Low-Rent Housing, Leased Housing Handbook, A HUD HANDBOOK (RHA 7430.1, Nov. 1969), Chap. 2, § 1.3(a). At pp. 58-59 *infra*, we will discuss the impact of this program on the housing need.

In addition to the low-rent programs of the Housing Act of 1937 as amended, Congress has enacted various housing measures. In § 236 of the Housing and Urban Development Act of 1968, the federal gov-

tions, local Housing Authorities may develop public housing for the poor entirely by the use of federal monies. The Department of Housing and Urban Development is empowered to make preliminary loans to local public housing agencies to assist in the planning of low-rent projects (42 U.S.C. § 1415(7)(a)); loans to assist in the development, acquisition, and administration of low-rent housing projects (42 U.S.C. § 1409); annual contributions to assist in achieving and maintaining the low-rent character of the housing projects (42 U.S.C. § 1410); and, in special circumstances, capital grants (42 U.S.C. § 1411).

In order to implement the federal Act, California enacted the Housing Authorities Law (Health and Safety Code

ernment provides for interest reduction payments on mortgages for nonprofit or limited-profit sponsors which build moderate-low income projects (12 U.S.C. § 1715z-1); *Hearings on Proposed Housing Legislation for 1968, Before Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency, 90th Cong., 2d Sess. (1968), pt. 1, p. 32.* This is principally a program for moderate-income persons, since rent supplement payments (necessary for low-income renters) are authorized for not more than 20% of the units (12 U.S.C. § 1701s(h)(1)(D)); *HUD Circular, Utilization of Rent Supplement and Public Housing Leasing Assistance in Moderate Income Programs, FHA § 4400.18 (Nov. 18, 1968).* The amendment of the Housing and Urban Development Act of 1969, Sec. 112, providing for an increase to 40% of the units "if the Secretary determines that such an increase is necessary and desirable," has not yet been put into effect. (*HUD Circular, Housing and Urban Development Act of 1969 (FHA § 4400.31, Jan. 5, 1970), § 3(e).*)

Section 236 of the 1968 Act was intended to replace § 221d(3) of the 1961 Act, 12 U.S.C. § 1715l(d)(3), which had similar, but not as favorable provisions for housing sponsors. *Hearings on Proposed Housing Legislation for 1968, Before Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency, 90th Cong., 2d Sess. (1968), pt. 1 at 9, 72-73 (1968).* The 1968 Act also added § 235, in order to assist lower-income (moderate-low income) families in acquiring homeownership. (12 U.S.C. § 1715z.) There are fixed maximum mortgage limitations (maximum home value limitations) mandated by the Act, and other restrictive provisions. *See generally, Homeownership for Lower Income Families (Section 235), A HUD HANDBOOK (FHA § 4441.1, Oct. 1968).* For further discussion of these programs, *See pp. 60-62 infra.*

§§34200 *et seq.*). That law included specific legislative findings that insanitary and unsafe dwelling accommodations exist in places within the State where persons of low income are found to reside; that there is a shortage of safe and sanitary dwelling accommodations available at rents which low-income people can afford; and that such conditions constitute a menace to the health, safety, morals and welfare of the residents of the State (Health and Safety Code §34201). The statute provides that a public corporate body, to be known as the Housing Authority, is formed in each county and city (Health and Safety Code § 34240). That Authority cannot transact business or exercise powers unless the governing body of the county or city declares that there is a need for an Authority (Health and Safety Code §34240). On March 18, 1941, by Resolution No. 468, the Board of Supervisors of San Mateo County unanimously declared the need for a Housing Authority pursuant to the Housing Authority Law (A. 111-113). On January 17, 1966, by Resolution No. 28614, the City Council of the City of San Jose declared the need for a Housing Authority pursuant to the Housing Authorities Law, with Councilwoman Shaffer alone not voting. (A. 46-47).⁷ Both resolutions expressly declare that "insanitary and unsafe inhabited dwelling accommodations exist" in the respective areas and that "there is a shortage of safe and sanitary dwelling accommodations . . . available to persons of low income at rentals they can afford" (A. 46, 111).

Once need is established and a Housing Authority has been activated, a professional staff is hired to develop plans

7. Mrs. Shaffer dissented from the subsequent resolution of the City Council appointing the Housing Authority Commissioners (A. 25-27), and thereafter from the resolution by which, in 1968, the City Council placed a proposed low-income housing project on the ballot for referendum pursuant to Article 34 (A. 28-29).

for participation in leasing and construction programs. For new construction, the Housing Authority initiates an application for a preliminary loan from the federal Department of Housing and Urban Development (H.U.D.). This loan is designed to pay for an option on a site, surveys, preparation of project plans, and other developmental expenses. In recognition of the need for local determination even at this early stage, the Federal Housing Act requires as a prerequisite to action by H.U.D. that the local governing body of the city or county approve by resolution the application for a preliminary loan (42 U.S.C. § 1415(7)(a)(i)). Moreover, the loan will not be approved by H.U.D. unless the local housing authority demonstrates that there is a need for such low-rent housing which is not being met by private enterprise (42 U.S.C. § 1415(7)(a)(ii)). Further contracts for loans or annual contributions will be approved by H.U.D. only after the local housing authority has entered into an agreement with the governing body of the locality providing for local cooperation (42 U.S.C. § 1415(7)(b)(i)). H.U.D. regulations require the cooperation agreement to be executed as a prerequisite to the Preliminary Loan Contract. (Low-Rent Housing, Applications and Preliminary Loan Handbook, A HUD HANDBOOK, (RHA 7402.1, June, 1969) Chap. 1, § 3.) The California Housing Authorities Law provides, for its part, that no low-rent housing project shall be developed or constructed without prior consultation with the local school district and approval by the local governing body by resolution (Health and Safety Code §34313).

When a project has been completely planned and approved, the local Housing Authority issues federally guaranteed tax-free revenue bonds for sale to the public, and enters into an Annual Contributions Contract with the Federal

Government. "The bonds and other obligations of an authority are not a debt of the city, county, State, or any of its political subdivisions and neither are they liable on the bonds, nor are the bonds or obligations payable out of any funds or properties other than those of the authority; and the bonds shall so state on their face. The bonds do not constitute an indebtedness within the meaning of any constitutional or statutory debt limitation." (Health and Safety Code, § 34353.) All costs for construction of the project are financed and paid for by proceeds from the bonds. The cost of repaying principal and interest to the purchasers of the bonds is totally financed and paid for by the Federal Government pursuant to its Annual Contributions Contract. (Low-Rent Housing, Financing Handbook, A HUD HANDBOOK (RHA 7560.1, June, 1969), Chap. 1, § 6b, Chap. 4, § 1b.) No local funds are used and no obligation of debt is imposed on the local government.

The federal Act also provides that the local government shall exempt the housing project from property tax. In lieu of property taxes, the local government receives 10% of the annual shelter rents in the project (42 U.S.C. § 1410(h)). The difference between 10% of shelter rents and the amount of taxes (possibly higher) which might be levied if the project were privately owned property is considered by the Federal Government to be a reasonable and necessary contribution by the local government. The local tax assessment scale, land value and use in the area, prior development and tax paid on the land where the low-income housing project is built, and the value of the project itself, would of course determine the exact measure of the local government's contribution, if any. Whatever that measure, the housing project does pay 10% of its rents as property tax,

and does not benefit from the total property tax exemption enjoyed by a variety of other land uses.⁸

2. ARTICLE 34 OF THE CALIFORNIA CONSTITUTION.

Under federal and state law, experts from the local governing body, the local Housing Authority and the federal government must independently consider the project plans and determine not only that the project is needed and wanted, but also that it is well planned, feasible as to cost and size, and complies with myriad technical requirements. *See* 42 U.S.C. §§1415(7)(a)(i), 1415(7)(a)(ii), 1415(7)(b)(i); Health and Safety Code § 34313; Low-Rent Housing, Preconstruction Handbook, A HUD HANDBOOK (RHA § 7410.1, June, 1969) Ch. 4, § 2. As indicated above, before a federally funded low-income public housing project can be constructed, four successive and distinct determinations must be made by the local governing body: to create a Housing Authority (Health and Safety Code, §34240); to apply for a preliminary loan to finance the planning of the project (42 U.S.C. § 1415(7)(a)(i)); to agree with the local Housing Authority to provide the requisite local cooperation (42 U.S.C. § 1415(7)(b)(i)); and to proceed with construction of the planned project (Health and Safety Code § 34313).

8. *See e.g.*, property belonging to the State, county, city or municipal corporation. (Cal. Const., Art. XIII, §1, Cal. Rev. & Tax Code, §202); parks, playgrounds, courthouses, and other property devoted to government use. (Cal. Rev. & Tax Code, §231); church property, (Cal. Const., Art. XIII, § 1-1/2, Cal. Rev. & Tax Code, § 206, 206.1); colleges and public schools, (Cal. Const., Art. XIII, § 1(a), Cal. Rev. & Tax Code §§ 202, 203); public libraries and museums, (Cal. Const., Art. XIII, § 1, Cal. Rev. & Tax Code, § 202); hospitals, (Cal. Const., Art. XIII, § 1(c); Cal. Rev. & Tax Code, §§ 214, 231); cemeteries, (Cal. Const., Art. XIII, § 1B; Cal. Rev. & Tax Code, § 204); property used exclusively for religious, hospital, scientific, or charitable purposes, (Cal. Rev. & Tax Code, § 214); fruit and nut-bearing trees under four years and grapevines under three years (Cal. Const., Art. XIII, §123/4s, Cal. Rev. & Tax Code, § 211).

Article 34 of the California Constitution, added by initiative referendum in 1950, engrafts upon these procedures an additional requirement: that development or construction of each specific project be affirmatively authorized by local popular referendum. Article 34 provides in relevant part:

Section 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

For the purposes of this article the term "low-rent housing project" shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. . . .

For the purposes of this article only "persons of low income" shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

Under California law, the Secretary of State is required to distribute, prior to elections at which initiative mea-

sures are submitted to the voters, an explanatory pamphlet containing, *inter alia*, arguments for and against each measure. In this pamphlet the proponents of Article 34 (then Proposition 10) advocated its adoption for the following reasons:

**ARGUMENT IN FAVOR OF INITIATIVE
PROPOSITION NO. 10 [Article 34]**

A "yes" vote for this proposed constitutional amendment is a vote neither for nor against public housing. It is a vote for the future right to say "yes" or "no" when the community considers a public housing project.

Passage of the "Public Housing Projects Law" will restore to the citizens of a city, town, or county, as the case may be, the right to decide whether public housing is needed or wanted in each particular locality. Such is not the case at present.

Time after time within the past year, California communities have had public housing projects forced upon them without regard either to the wishes of the citizens or community needs. This is a particularly critical matter in view of the fact that the long-term, multimillion-dollar public housing contracts call for tax waivers and other forms of local assistance, which the Federal Government says will amount to half the cost of the federal subsidy on the project as long as it exists.

For government to coerce such additional hidden expense on the voters at a time when taxation and the cost of living have reached an extreme high is a "gift" of debatable value. It should be accepted or rejected by ballot.

If, on the other hand, certain communities are in such dire need of housing that the cost of long-term subsidization is deemed worthwhile, local voters, who best know that need, should have the right to express their wishes by ballot.

In either case, a "yes" vote for this proposed amendment will strengthen local self-government and restore to the community the right to determine its own future course.

Furthermore, the financing of public housing projects is an adaptation of the principle of the issuance of revenue bonds. Under California law, revenue bonds, which bind a community to many years of debt, cannot be issued without local approval given by ballot. Public housing and its long years of hidden debt should also be submitted to the voters to give them the right to decide whether the need for public housing is worth the cost.

A "yes" vote for the "Public Housing Projects Law" is a vote for strong local self-government. It is an expression of confidence in the community's future and in the democratic process of government. To strengthen the grass roots democracy which has made America protector of the world's free peoples, vote "yes" on the Public Housing Projects Law. (A. 50-52.)⁹

Those opposed to Article 34 argued, in part, that Article 34 was unnecessary since local approval was already provided for in the Housing Authorities Law; that Article 34 was contrary to firmly established principles of American

9. On November 3, 1950, immediately prior to the election, the *Los Angeles Times*, the state's most widely circulated newspaper, offered the following editorial explanation of the measure (vol. LXIX, Nov. 3, 1950, pt. II, p. 4; R 250):

... What has happened in the field of public housing is that control has gotten completely out of the hands of the citizen. Suppose—and this has happened many times—you read in this morning's paper that a new government housing project for low-income families is going to be built across the street from you. You know this will change all the years of planning and building you have done on your home, and ruin the market value of your property...

representative government; that elections are time-consuming and very expensive; and that Article 34's true purpose was to discourage the construction of low-rent housing projects (A. 52-54).

C. Proceedings Below

The cases designated No. 154 and No. 226 in this Court are two appeals from the single judgment entered by the court below (A. 178-179). That judgment was entered in two companion suits which were filed separately but were subsequently "consolidated for all purposes" (A. 178) by the district court. Because the two appeals in this Court do *not* correspond to the two actions in the court below, and because the array of parties and their respective positions throughout this litigation are somewhat complicated, it may be helpful to identify the parties and describe the proceedings below systematically.

1. On August 27, 1969, a complaint was filed in the district court, styled *Anita Valtierra, et al. v. Housing Authority of the City of San Jose, et al.* (A.1). The individual plaintiffs were members of three impoverished families who had been found eligible and placed on the waiting list for public housing in the City of San Jose, Santa Clara County, California (A. 14-20). (The City of San Jose has established its own Housing Authority (A. 46-47, 25-27) which administers public housing programs within the city and is independent of the Housing Authority of Santa Clara County (See A. 31-33).)

2. The plaintiffs in *Valtierra* sued on their own behalf, and also as representatives of all poor persons on the waiting list of the Housing Authority of the City of San Jose (A. 5). Admissions filed by the Housing Authority on November 18, 1969, establish that there were 779 families on the waiting list as of that date (A. 56).

3. Defendants in *Valtierra* were the Housing Authority of the City of San Jose and its members, the City Council of San Jose and its members, the Mayor of San Jose, the United States Department of Housing and Urban Development (H.U.D.), and its Secretary, George Romney (A.1, 5-6.). The district court dismissed H.U.D. and Secretary Romney on the ground that "their joinder is not necessary in order to grant the relief . . . requested" in the action (A. 171). Separate answers to the complaint were filed (1) by the Housing Authority and its members (A. 39-40), and (2) by the City Council and its members (who include the Mayor of San Jose and Councilwoman Virginia Shaffer, among others) (A. 63-66). In response to requests for admissions filed by the plaintiffs (A. 41-45), separate sets of admissions were subsequently filed (1) by the Housing Authority and its members (A. 55-56); (2) by the City Council and its members other than Virginia Shaffer (A. 57), and (3) by Virginia Shaffer (A. 58). With the exception of this one separately filed document, Virginia Shaffer asserted no individual position independent of her municipal co-defendants throughout the proceedings in the district court. She was notified of those proceedings and represented therein by the City Attorney of San Jose, together with the other municipal defendants.

4. On October 1, 1969, a second complaint was filed in the district court, styled *Gussie Hayes et al. v. Housing Authority of San Mateo County et al.* (A. 79). The individual plaintiffs in this *Hayes* action were members of four impoverished families residing in San Mateo County¹⁰ who were eligible for public housing. Three had been found eligible by the Housing Authority of San Mateo County and were on the waiting list (A. 104-109). The fourth was

10. San Mateo County borders Santa Clara County to the North.

still awaiting an interview to determine eligibility, because the press of numbers was such that interviews were backlogged three to five months (A. 110, 124).

5. The plaintiffs in *Hayes* sued on their own behalf and as representatives of all poor persons eligible for public housing in San Mateo County (A. 85). An affidavit of the Executive Director of the Housing Authority of the County established that, at the time of filing of the action, there were more than 2000 families who had been found eligible and placed on the waiting list for public housing, while scheduled interviews for additional eligibility determinations were running at least three months behind (A. 123-124).

6. Defendants in *Hayes* were the Housing Authority of San Mateo County and its members (A. 79, 85-86). They declined "to appear formally in [the] . . . action," noting that "[b]y virtue of the fact that this action has been consolidated with *Valtierra* . . . , the question as to the constitutionality of Article XXXIV of the Constitution of the State of California will undoubtedly be resolved."¹¹

7. In *Valtierra*, the plaintiffs requested a preliminary injunction on August 27, 1969, upon the affidavits filed with their complaint (R. 29-30; *See* A. 73, 165), and the defendants filed motions to dismiss on September 23, 1969 and November 12, 1969 (A. 73, 74). In *Hayes*, the plaintiffs moved for summary judgment upon numerous affidavits on November 6 (A. 164; R. 282). The cases were consolidated for hearing by a statutory three-judge court on November 20 (A. 163, 75, 165, 170). Pursuant to 28 U.S.C. §2284(2), the Governor and the Attorney General of the State of California were notified of the hearing, both by the court and by the parties. No appearance was made for the State.

11. These positions were stated in a letter to the court from counsel for the Housing Authority (A. 160-161).

8. At the hearing on November 20, the consolidated cases were fully argued upon all issues presented. The plaintiffs in *Valtierra* indicated their intention to file a motion for summary judgment, in order to place the *Valtierra* action in the same procedural posture as the *Hayes* action. (That motion was in fact filed on November 25 (A. 68-69, 75).) The defendants were given until December 1 to file any affidavits they might wish to submit in response (A. 75, 165-66). They filed none, but did enter into a stipulation of fact that was filed on November 28 (A. 69-70, 75). Thereafter, pursuant to its orders of November 20, the court proceeded to consider the several pending motions upon the complaints (A. 1-13, 79-96), answers (A. 39-40, 63-66), affidavits (A. 14-24, 31-33, 59-62, 67-68, 104-110, 122-159), stipulation (A. 69-70), admissions (A. 55-58), and documents (A. 25-30, 34-38, 46-54, 75 (docket entry #29), 97-103, 111-121) of record.

9. On March 23, the court rendered its unanimous opinion (A. 168-177), in the consolidated cases (A. 163, 170, 178), denying the defendants' motions to dismiss (A. 172) and granting plaintiffs' motions for summary judgment (A. 177-179) upon findings that "there is no genuine issue of material fact" (A. 178) and that "plaintiffs in both causes are entitled to summary judgment as a matter of law" (*Ibid.*). The court found "plaintiffs' Supremacy Clause argument to be unpersuasive and therefore [did] . . . not decide the case on that ground" (A. 172). It concluded that Article 34 violated the Equal Protection Clause of the Fourteenth Amendment because it denied poor persons and racial minority groups the ordinary processes of law (A. 173-175), and made it "more difficult for state agencies acting on behalf of the poor and the minorities to get federal assistance for housing than for state agencies acting on behalf of other groups to receive financial federal

assistance" (A. 176). This discrimination resulted from the express limitation of the referendum requirement of Article 34 to housing for "low-income persons" (A. 173), a group whom the court found to be comprised largely of racial minorities (A. 176). The court therefore declared Article 34 unconstitutional (A. 169, 177, 178) and enjoined its enforcement (A. 177, 178-179) "as a reason for not requesting state or federal assistance with which to finance low income housing" (A. 179; *see* A. 172). This decree, as the court made clear, did not compel any Housing Authority or local governing body to seek federal funding for public housing; it did not delimit in any way the discretion of Housing Authorities or local governing bodies to choose to have or not to have public housing in any form (A. 172). The only effect of the decree was to strike down Article 34's discriminatory requirement of affirmative approval by local popular referendum as a precondition of development of federally funded housing for low-income persons.

10. On April 2, 1970, the San Jose City Council defendants' motion to stay execution of the court's judgment was denied, and the final judgment was entered (A. 76).

11. The Mayor and the other members of the City Council of San Jose, excepting Councilwoman Virginia C. Shaffer, appealed to this Court and appear here as the appellants in No. 154, *Ronald James, et. al. v. Anita Valtierra, et al.* San Jose City Councilwoman Virginia C. Shaffer filed a separate jurisdictional statement, and appears as the appellant in No. 226, *Virginia C. Shaffer v. Anita Valtierra, et al.* Appellees in Nos. 154 and 226 are the individual and class plaintiffs in both the *Valtierra* and *Hayes* cases.

12. The Housing Authority of San Mateo County and its members have not appealed and do not appear in this

Court. The Housing Authority of the City of San Jose and its members have not appealed; we are advised, moreover, that they intend to file a brief herein in support of the judgment below.

Before concluding this description of the parties and the proceedings below, it seems appropriate to dispel several misimpressions created by the brief filed on behalf of appellant Shaffer. *First*, contrary to footnote 10a on p. 13 of that brief, *both* the *Valtierra* and *Hayes* records are properly before this Court on the appeals.¹² The two cases were expressly "consolidated for all purposes" by order of the district court (A. 178; *see also*, A. 163, docket entry October 10, and the court's opinion at A. 170). It is apparent, moreover, that all of the district court plaintiffs have the same direct interest in the outcome of the appeal. *Second*, the impression conveyed by the *Shaffer* brief that appellant Shaffer has somehow not had a full chance to tell her story below—an effort apparently designed to excuse her inclusion in her brief of materials outside the record and not judicially noticeable—is entirely unwarranted. Mrs. Shaffer appeared below, she was represented below, and she had every opportunity, as did all of the defendants, to submit materials for the record on summary judgment. That she "retained new counsel after appeal" (*Shaffer Brief*, p. 17) is hardly a justification for her trying the case *de novo* in this Court. *Third*, appellant Shaffer's assertion that this is "a feigned case" (*id.*, at p. 16) in which her fellow defendants of the San Jose City Council "put up indifferent opposition [below] and appealed in order to obtain this Court's approval of the judgment, not

12. The brief also errs in stating (*ibid*) that "Appellees have caused to be reproduced in the Appendix the record of *Hayes* . . ." The *Hayes* record was reproduced by the appellants—properly so, since the cases were consolidated for all purposes.

reversal" (Id., p. 17) is also factually baseless. The record below was made in adversary fashion and is subject neither to vague aspersions of connivance nor to reconstruction by appellate briefing.¹³

D. Facts Relevant to the Constitutional Questions

The individual appellees are 41 persons of low income—seven families of mothers and children—eligible for public housing. Six of these families have been determined to be eligible and have been placed on the waiting lists of their respective local Housing Authorities, where they have remained for periods ranging from three months to two years and nine months (A. 14, 17, 19, 104, 106, 108). The seventh family was undergoing a five-month wait for an interview to determine eligibility at the time the suit was filed (A. 110). Appellees have not been placed in decent, safe and sanitary low-rent units because no units are available. As a result, they now live in overcrowded, run-down, rat-infested, roach-infested dwellings.

In San Jose, Anita Valtierra lives with her seven minor children in a one-bedroom apartment (A. 14). Similar overcrowding is the forced way of life for all of the appellees (A. 17, 19, 104, 106, 108, 110). Mrs. Valtierra has been unable to find a larger home for her family which she can afford (A. 15); this too is a common problem (A. 17, 19, 105, 106-107).¹⁴

13. *The Shaffer* brief also asserts (p. 27), "*Self-evidently, plaintiffs are not even the moving force in the suit; their names have been conscripted by counsel interested in obtaining an advisory opinion serviceable to their social views.*" (Emphasis in original.) The charge is both gratuitous and false. The plaintiffs in question were not "conscripted." They were not "mere names." They are forty-one vitally affected women and children who have been living in conditions of squalor and have the determination to seek escape from that condition by any means lawfully within their power.

14. *See, Draft, The Housing Situation: 1969* (The County of

In San Mateo County, Gussie Hayes lives with five of her minor children in a house which is infested with mice and cockroaches (A. 104). The sewerline in the backyard is broken, and there is a backup of sewage in the toilet and bathtub. The children cannot use the toilet, or take baths, and must go to a relative's home for these facilities (A. 104). Substandard housing of this sort (A. 97-103) is all that appellees and other similarly situated persons can afford (A. 17, 19, 60, 67-68, 108, 110).¹⁵ Yet, for such housing, appellees are required to pay rents which are exorbitant in light of their income, with the result that they are deprived of other necessities such as clothing (A. 20, 105, 107). Mrs. Hayes has placed one of her children with her sister because of the demeaning conditions in her home (A. 104). Because of the unavailability of decent, low-cost housing, the breaking up of families is not uncommon (A. 14, 19, 107, 129-30).

More than 2,779 families in San Mateo County and in the City of San Jose are in basically the same situation as the named appellees and share the waiting list for low-rent housing.¹⁶ The waiting lists would probably be longer if it were not for the excessively long delay in obtaining a determination of eligibility (A. 110, 124) and the hopelessness of

Santa Clara, November 4, 1969), plaintiffs' exhibit, unnumbered in the record (*See* A. 75, docket entry no. 29) [hereafter cited as *Draft, The Housing Situation: 1969*], at pp. 26-27. This document was filed in draft form because the final study was not completed until after the cases were submitted.

15. *See, Draft, The Housing Situation: 1969*, p. 35.

16. At the time the complaints were filed there were over 2,000 families on the waiting list of the San Mateo County Housing Authority (A. 123-124), and 779 eligible families on the waiting list of the Housing Authority of the City of San Jose (A. 56). *See* A. 21 and A. 23, which show that the City of Fresno Housing Authority has 1,000 families on the waiting list, and the Housing Authority of Sacramento, 2,862 families, respectively.

going through the process of an interview for eligibility when it is widely known that no housing is available.¹⁷

Both the San Mateo County Housing Authority and the Housing Authority of the City of San Jose have taken advantage of the leased housing program that is federally financed under the Housing Act of 1937, but the program has been unsuccessful in alleviating the tremendous shortage of housing available for persons of low income (A. 123-4, 61). The leased housing program has proved similarly inadequate elsewhere in California (A. 21-22, 23-24, 31). It is widely agreed that direct construction of low-rent housing is indispensable if acute needs are to be met (A. 22, 24, 31-33, 122-24).

The roadblock to obtaining this desperately needed housing for the poor is Article 34 of the California Constitution which requires voter approval for federally financed low-income housing projects (A. 21, 23, 31-33, 122-124, 126, 128, 130, 133, 135-36, 138, 141, 143-44, 153, 155). In 1968, a proposal for low-rent housing units submitted to the voters of the City of San Jose was defeated (A. 28-30). In 1966, two elections were held pursuant to Article 34 in the City of Pacifica, San Mateo County. Both failed (A. 114-21).¹⁸ In the opinion of the Director of the San Mateo County Housing Authority, any low-income public housing proposal within the County would be overwhelmingly defeated at a referendum, because the predominant middle- and upper-

17. See Affidavit of Fergus P. Cambern, Executive Director of the Housing Authorities of the County and City of Fresno (A. 21); *Draft, The Housing Situation: 1969*, p. 42.

18. A referendum in 1951, in Half-Moon Bay, San Mateo County, for 50 units of locally funded (non-federal) Senior housing was successful. In the opinion of the Director of the Housing Authority of San Mateo County, approval of such Senior housing would be doubtful today, and public housing would be overwhelmingly defeated (A. 123).

income residents fear devaluation of their property and an influx of low-income and minority groups (A. 122). This view is shared by many residents of San Mateo and Santa Clara counties who have had long experience in the housing area (A. 126, 128, 130, 133, 135-36, 138, 141, 143-44, 153, 155).¹⁹

Most of the appellees are members of racial minority groups; those in San Mateo are predominantly black (A. 80-84), and those in Santa Clara are predominantly Spanish-surnamed (A. 3-5). Racial minorities are over-represented in the low-income group and in the occupation of substandard overcrowded housing.²⁰ This is attributable in significant measure to class and race prejudice.²¹ Realtors and homeowners in the area commonly assert, "wouldn't they be happier with their own people;" "I personally have no bias, but my neighbors would object;" or "my other tenants would move out" (A. 125). Discriminatory practices in housing include "prohibitive extra costs and requirements imposed on leases if blacks wish to rent" (A. 127); also, "Blacks are continually told that apartments were just rented, even though later checks reveal that they are still available; owners don't open the door when they see that blacks are ringing the doorbell; realtors require black persons to go through long, detailed credit checks, and don't require the same for white applicants; they also claim no one is available to show an apartment, or claim the apartment keys were misplaced. The worst practice occurs when landlords ask black applicants very personal, probing questions which

19. The view is also shared by the Housing Authority Directors in Fresno and Santa Clara counties (A. 21-22, 31-32).

20. *Draft, The Housing Situation: 1969*, pp. 49-52, 53; A. 61-62, 128, 129-30, 138, 143-44, 148, 153, 154.

21. *Draft, The Housing Situation: 1969*, pp. 73-79; A. 22, 32, 61-62, 122, 125-26, 127-28, 129-30, 131-133, 134-36, 137-38, 139-41, 142-44, 151-53, 154-55.

invariably cause the applicants to leave" (A. 137-138). (*See* A. 143.) These practices are often rationalized as a protection against economic devaluation of property (A. 127). Nonprofit sponsors of low-and moderate-income projects have been thwarted by racial prejudices (A. 139-40). This is also true of the leased housing program (A. 140, 123). One experienced observer in San Mateo County states:

From my experience as an attorney, as a participator in negotiations for the purpose of obtaining agreements from persons in the housing industry to publicize pledges to provide open housing, upon investigation through testing and other means, and from discussions with individuals and groups in the housing industry as to the basis for refusals to rent or sell housing, I have formed the opinion that discrimination in housing in San Mateo County on the basis of race and ethnic background prevails throughout the housing industry. I have also formed the opinion that the major method by which laws against open discrimination are evaded is by making most housing in San Mateo County economically beyond the means of most members of racial minority groups. It is my opinion that a referendum within the county or any city in San Mateo County, with respect to proposed low-income housing would result in the primary issue being the admission or exclusion of members of racial minority groups (A. 133).²²

SUMMARY OF ARGUMENT

I.

Article 34 denies poor persons the equal protection of the laws in the most rudimentary sense: by depriving them of access to the ordinary law-making processes of government for the protection of their housing interests. It re-

22. *See also* notes 20-21, *supra*.

quires the approval of a popular plebiscite to develop federally-funded public housing for "persons of low income," whereas all other similar governmental decisions under California law may be made legislatively, without the necessity of a plebiscite. This is not a "neutral" provision of law. It is an invidious discrimination, directed explicitly against the poor, which excludes them from both normal political institutions and vitally needed federal benefits. It cannot be constitutionally sustained unless shown to be supported by some compelling state interest; and the interests asserted to support it—far from being compelling—are entirely hollow.

II.

In its setting, Article 34 is simply a device for making popular resistance legally effective whenever and wherever the federal public-housing program threatens to intrude upon that most sensitive preserve of racism: residential segregation. Article 34 has no other coherent function or inevitable effect than to authorize and invite a racial veto within the administration of a governmental housing program. It is accordingly unconstitutional.

III.

The referendum requirement of Article 34 is inconsistent with the elaborate and specific procedures defined by federal law for the development of federally-funded public housing programs under the United States Housing Act of 1937. It impedes the operation of the Act and frustrates its purposes. Article 34 cannot stand consistently with the Act and the Supremacy Clause.

ARGUMENT

I

Article 34 Violates the Equal Protection Clause of the Fourteenth Amendment Because It Discriminatorily Denies Poor Persons the Use of Ordinary Law-Making Procedures

The Fourteenth Amendment forbids a State to "deny to any person within its jurisdiction the equal protection of the laws." An elementary meaning of that guarantee is that a State may not invidiously discriminate among persons or groups in access to its basic law-making and law-administering machinery, by which public protection is ordinarily given to private rights. *E.g., Williams v. Rhodes*, 393 U.S. 23 (1968). When any group is unjustifiably refused the use of legal processes that are available for the promotion and advancement of the interests of other groups—when its interests are required to be pursued through different and more burdensome legal channels—it is denied equal protection of the laws in the most fundamental sense. *Hunter v. Erickson*, 393 U.S. 385 (1969). The question presented here is whether Article 34 offends that principle.

We submit that it plainly does. In the following subsections, we show first that Article 34 places an extraordinary and onerous referendum requirement selectively athwart the process of decision-making to which poor persons must look for the fulfillment of their housing needs. California law requires no similar referendum in the making of any similar governmental decision. (Subsection A.) Next, we note that this selective requirement, which explicitly applies only to the poor and operates to deny them vital federal benefits, cannot survive constitutional scrutiny unless it is supported by some compelling state interest. (Subsection B.) Finally, we examine the interests that are said to support Article 34, and find them wanting. (Subsection C.)

A. THE MANDATORY REFERENDUM REQUIRED BY ARTICLE 34 TO AUTHORIZE LOW-INCOME PUBLIC HOUSING CONSTRUCTION IS DIFFERENT AND MORE BURDENSOME THAN THE PROCEDURES BY WHICH ALL SIMILAR DECISIONS ARE MADE UNDER CALIFORNIA LAW

Appellant Shaffer's Brief in No. 226 seeks to convey the impression that the referendum requirement of Article 34 is nothing more than the application to low-income public housing of a general California practice that subjects all legislative decision-making to popular referenda. (Pp. 6-7, 18, 33-34, 48-49, 54.) That impression is wrong. It rests upon a confusion of two entirely different referendum procedures under California law.

1. THE REVIEW REFERENDUM

Article 4, § 1, of the California Constitution provides that, upon petition signed by a designated percentage of the electorate,²³ any state or local legislative enactment shall be submitted to the voters for rejection or adoption. This sort of referendum, which we may call a *review referendum*, is indeed an "all-pervasive" feature of California government. (Brief for Appellant Shaffer, p. 54.) It applies to legislation upon all subjects, in favor of any and all interests, at all levels of law-making. Its effect is not to require law-making

23. Art. 4, § 1, ¶ 7, and Art. 4, § 23 require that an enactment of the state legislature be submitted to referendum upon petition of 5% of the number of electors who cast votes for Governor at the last gubernatorial election. Art. 4, § 1, ¶ 18 leaves the details of referendum procedure at the county and city levels to be fixed by state and local law, which, however, "shall not require . . . more than 10 percent of the electors . . . to order the referendum." Cal. Elections Code §§ 3752-3753 require a referendum upon a county ordinance on petition by not less than 10% of the number of voters of the county who voted for Governor at the preceding gubernatorial election. The Charter of the County of San Mateo (1966), Art. 12, § 2, adopts these provisions. The Charter of the City of San Jose (1965), §1603, provides for referendum on petition of 8% of the number of electors eligible to vote in the preceding municipal election.

by popular plebiscite. It permits law-making in the first instance—and ordinarily in the last instance—by legislative action alone. If, however, a sufficient number of electors can be organized to sign a petition in opposition to a legislative enactment, then that enactment is submitted to the voters for review at the polls.

The California courts have long and consistently held—like most state courts under similar constitutional provisions²⁴—that Article 4, § 1 applies only to “legislative” as distinguished from “executive” or “administrative” enactments.²⁵ It was pursuant to this doctrine, in 1941 and 1950, that the California Supreme Court characterized municipal decisions to proceed with particular federally-funded low-income housing projects as “administrative” and hence not subject to referendum under Article 4, § 1.²⁶ We need not

24. See 62 C.J.S., MUNICIPAL CORPORATIONS, § 454 (1949), at 874-875.

25. *Hopping v. City Council of City of Richmond*, 170 Cal.605, 150 Pac. 977 (1915). Compare *Martin v. Smith*, 184 Cal.App.2d 571, 7 Cal.Rptr. 725 (1960), with *Reagan v. City of Sausalito*, 210 Cal.App.2d 618, 26 Cal.Rptr. 775 (1962); and see the discussion of the principal authorities in *Hughes v. City of Lincoln*, 232 Cal.App.2d 741, 43 Cal.Rptr. 306 (1965); Greenberg, *The Scope of the Initiative and Referendum in California*, 54 CALIF. L. REV. 1717, 1734-1738 (1966); Note, *Judicial Limitations on the Initiative and Referendum in California Municipalities*, 17 HASTINGS L. J. 805, 806-812 (1966).

26. *Kleiber v. City and County of San Francisco*, 18 Cal.2d 718, 117 P.2d 657 (1941); *Housing Authority of the City of Eureka v. Superior Court*, 35 Cal.2d 550, 219 P.2d 457 (1950). The *Kleiber* case involved the question whether the San Francisco Board of Supervisors could approve low-income public-housing contracts by resolution, or were required to act by ordinance. Under the applicable law, this question depended upon the characterization of the contracts as “legislative” or “administrative”; and the California Supreme Court decided that they were “administrative.” Quite expectably, *Kleiber* was thought controlling nine years later when, in the *Housing Authority* case, the same question of characterization arose in connection with the application of the referendum provision of Article 4, § 1.

pursue the question whether appellants are historically correct in viewing Article 34 as an "immediate response" to the later of these two routine holdings (Brief for Appellant Shaffer, p. 7; see Brief for Appellants James *et al.*, pp. 13-14).²⁷ For if, historically, Article 34 was a "response," it was legally an over-response, and a discriminatory one. Article 34 did not subject low-income public housing decisions to the "general democratic principle"²⁸ of Article 4, § 1. Instead, it imposed upon the proponents of low-income housing projects alone a different and more burdensome referendum procedure.

2. THE MANDATORY PRIOR-APPROVAL REFERENDUM

Article 34 involves a *mandatory prior-approval referendum* (hereafter called simply a mandatory referendum). Under its procedures, which apply exclusively to the development of public housing for the poor, the ordinary legislative competence of local governing bodies is denied, and they may act only as specifically authorized by popular plebiscite.

Whereas Article 4, § 1, *supra*, permits other governmental decisions to be made legislatively subject only to review and undoing by the electorate at the behest of opponents of the legislation who are able to obtain the requisite number of signatures on a referendum petition, Article 34 requires the proponents of low-income public housing to bear the double burden of obtaining local legislative approval *and* the advance approval of the voters at the polls. This burden would be heavy enough if imposed upon any group. In fact it is imposed only upon the poor, who are least able to finance a popular electoral campaign. The difference between the

27. Compare the materials relating to the history of Article 34 at pp. 13-16 *supra* and p. 72 *infra*.

28. Mr. Justice Harlan, concurring, in *Hunter v. Erickson*, *supra*, 393 U.S., at 394.

referendum procedure of Article 4, § 1 and that of Article 34, in short, is exactly the difference between the general referendum provision of the Akron City Charter in *Hunter v. Erickson*, *supra*, 393 U.S., at 390 n.6, and the special referendum requirement for open-housing legislation held unconstitutional in that case.

Other than the low-income housing decision governed by Article 34, the California Constitution requires mandatory referendum approval for only one class of governmental decision-making.²⁹ That is the decision of a county, city or school district to assume long-term indebtedness under a general-obligation bond. Cal. Const., Art. 13, § 40 (former Art. 11, § 18); see *Westbrook v. Mihaly*, 2 Cal.3d 765, 471 P.2d 487, 87 Cal.Rptr. 839 (1970). Former article 11, § 18 is not, as appellant Shaffer portrays it, a general command that "fiscal control be in the voters' hands" (Brief for Appellant Shaffer, p. 33). It is, to the contrary, a rather narrow and technical provision, as we shall show at pp. 48-51 *infra*. For present purposes, it is enough to note that Article 11, § 18 leaves unaffected all sorts of governmental decisions essentially identical to those involved in the development of federally-funded low-income public housing (see the immediately succeeding paragraphs); while those decisions that Article 11, § 18 does affect are unlike public-housing decisions because they involve the assumption of general bonded indebtedness by a governmental entity having taxing powers.

In summary, then under California law only two kinds of governmental decisions are constitutionally required to re-

29. We exclude such extraordinary matters as the formation of new charter governments and territorial annexations. It is interesting to note, however, that under California law, even annexation may ordinarily occur without a mandatory referendum in the annexing territory: a referendum in the annexed territory is sufficient. Cal. Const., Art. XI, §§ 7-1½, 8-1½; Cal. Gov't Code §§ 35000 *et seq.*

ceive the approval of mandatory referenda: (A) decisions to assume a limited class of public debts; and (B), pursuant to Article 34, the decision to proceed with low-income public housing, even though no public debt is assumed. All other governmental decisions are subject only to review referenda, or to none.³⁰ A few examples will demonstrate the discriminatory impact of Article 34 upon the local political process:

(1) *All decisions affecting private or public land use, except the decision to use land for low-income public housing, may be made without mandatory referenda.* Thus, for example, an interest group concerned with private development of any particular sort—a shopping center, luxury apartments, a cement plant—may procure the necessary zoning changes (whether through variances or through amendment of the zoning laws) legislatively.³¹ A group interested in having a municipal swimming pool, garage, bus terminal or airport may secure their construction legislatively, if either revenue-bond financing is used³² or some quasi-governmental agency, functionally akin to a housing authority, is created to issue any sort of bonds.³³ Land may be purchased or condemned by the municipality, in order to preserve it as a park; that decision may be reversed and the land built up (or converted to a refuse dump); then, what was built up may be torn down

30. In certain matters, California municipalities may elect to assume additional referendum requirements. See note 54 *infra*.

31. If the zoning change were made by means of an amendment to the zoning ordinance, it would be subject to a review referendum under Art. 4, §1; if made by means of allowance of a variance, it would not be referable at all. See *Essick v. City of Los Angeles*, 34 Cal.2d 614, 623-624, 213 P.2d 492, 498 (1950); and compare *Johnson v. City of Claremont*, 49 Cal.2d 826, 323 P.2d 71 (1958), with *Allen v. Humboldt County Board of Supervisors*, 241 Cal.App.2d 158, 50 Cal.Rptr. 444 (1966).

32. See p. 49-51 n. 55-56 *infra*.

33. See *Westbrook v. Mihaly*, 2 Cal.3d 765, 791 n. 50, 471 P.2d 487, 505 n. 50, 87 Cal.Rptr. 839, 857 n. 50 (1970).

again, all legislatively, without a popular referendum.³⁴ Under state authority, neighborhood renewal agencies may issue bonds, and may purchase and sell land, for the purpose of upgrading housing for all income levels; public housing for farm workers at all income levels may be developed; neither of these two programs requires mandatory referendum approval except to the extent that housing for "persons of low income" is involved.³⁵

34. For municipal power to maintain parks, *see* Cal. Public Resources Code §§ 5301-5303; Cal. Gov't Code § 39732. For municipal power to erect public buildings, *see* Cal. Gov't Code § 37352. The sorts of decisions mentioned in text would be subject only to a potential review referendum, under Article 4, § 1. *See Reagan v. City of Sausalito*, 210 Cal.App.2d 618, 26 Cal.Rptr. 775 (1962); *Burdick v. City of San Diego*, 29 Cal.App.2d 565, 566, 84 P.2d 1064, 1065 (1938) (dictum).

35. California law authorizes the establishment of farm labor centers to house persons and families engaged in agricultural work. Health and Safety Code §§ 36050, *et seq.* This housing is to be provided "without regard to whether such persons and families have low income." Health and Safety Code § 36051; *see* Health and Safety Code § 36062. Any housing authority is given power to acquire, own, operate, construct, etc. such farm labor centers. Health and Safety Code § 36056. Any and all things may be done to secure the financial aid of the federal government. Health and Safety Code § 36057. "A farm labor center is declared to be public property used for essential public and governmental purposes and is for a public use and purpose and involves a governmental function of state concern. As a matter of legislative determination, it is hereby found and declared that the properties involved in farm labor centers are of such character and shall be exempt from taxation." Health and Safety Code § 36063. A housing authority *may* make payments in lieu of taxes (*ibid.*). Only if the center is acquired by the Housing Authority as a low-rent housing project must it conform to the requirement of Article 34; and then shall not be deemed a farm labor center. Health and Safety Code § 36068.

California law also authorizes the establishment of renewal area agencies which are public agencies of the state. Health and Safety Code §§ 33701, *et seq.* They can provide "low-income, middle-income and normal-market housing, including single- or multiple-family dwellings, and sufficient commercial establishments to serve persons living within a reasonable distance of the renewal area, and for the purpose of rebuilding or rehabilitating a renewal area to maintain its neighborhood character." Health and Safety Code § 33708. This

(2) *Decisions of this sort may be made without a public vote, although they "alter the characteristics of [the] ... very environment for generations"* (Brief for Appellant Shaffer, p. 38). The foregoing examples of the cement plant and the airport make the point. Ironically, low-income public housing projects are required to conform to all local planning, zoning, sanitary and building laws (see p. 52 *infra*); and they are required by Article 34 to receive the approval of a mandatory referendum. However, if anything but low-income public housing is in question, all of the planning, zoning, sanitary and building laws themselves may be amended or repealed, without the necessity of a referendum.³⁶ Groups seeking to change these laws have only to proceed through the normal legislative process.

(3) *Similarly, decisions may be made which significantly affect the local public fisc—for example, by sanctioning property uses that render the property tax-exempt or require additional public services* (see Brief for Appellant Shaffer,

program, initiated in 1968 (Cal. Stats. 1968, c.1392, p. 2733, §1), emphasizes local participation and retention of neighborhood character, thereby taking a different approach from traditional federally financed urban renewal programs.

At the present time, no housing is owned or leased for residential purposes for other than low-income persons by any state public body or agency in California. (A. 69-70.) The only residential housing now maintained by state agencies is housing for state college and university students and faculty, and housing for employees of state institutions. (*Ibid.*) Nonetheless, the legislative authorizations described in the preceding two paragraphs would permit the development of such housing, for other than low-income persons, without a mandatory referendum.

36. The authority of local governments in California to enact these various laws are recognized as follows: zoning, Cal. Gov't Code §§65800 *et seq.*; planning, Cal. Gov't Code §§65100 *et seq.*, 65300 *et seq.*; sanitary code, Cal. Health & Safety Code, §§450, 500; building code, Cal. Gov't Code §§38601(b), 38660; Cal. Health & Safety Code, § 19825 *et seq.*; and see Cal. Const., Art. XI, §§ 6, 8, 11, conferring broad municipal powers generally.

pp. 34-35), without a mandatory referendum. Any group may persuade the local governing body to cooperate in attracting a tax-exempt Hill-Burton hospital³⁷ to the area, or to accept the donation of some local art fancier's home as a tax-exempt public museum, without a referendum.³⁸ And while a referendum is required by Article 34 in order to put five units of low-income housing on an empty lot adjacent to the police station, the police station itself may be moved without a referendum into an isolated area half-across town, thereby multiplying the general cost of police services many-fold. Needless to say, no referendum is required to support those property-owners who prevail upon the city council to keep property taxes low, even though the slightest fractional increase in the tax rate would offset a thousand times the loss in taxable property necessary to house all the poor of the vicinity in federally-funded low-income housing.

(4) Decisions may be made without a referendum to participate in numerous other federal programs,³⁹ including programs that radically affect land use and values,⁴⁰ and

37. See note 40 *infra*.

38. Concerning the several sorts of tax-exempt land in California, see note 8 *supra*.

39. See e.g., *Urban Beautification and Improvement*, 42 U.S.C. §§1500-1500e (grants to state and local public bodies to assist in the acquisition and beautification of open space, and grants to preserve sites of historic value: federal assistance up to 50% of the cost; see Cal. Health and Safety Code §§37102-37111); *Comprehensive Planning Assistance*, 40 U.S.C. § 461 (grants principally to assist state and local governments in planning regarding increasing population in urban areas, the lack of coordinated development of resources and services in rural areas, and coordinated transportation: federal financial assistance up to 2/3 of the cost; see, as to urban development, Cal. Gov't Code § 65065.2); *Land and Water Conservation Fund Act*, 16 U.S.C. §§ 4601-4 to -11 (grants to states to acquire and develop land and water areas and facilities for outdoor recreation; see Cal. Public Resources Code §§ 5099-5099.11).

40. See e.g., *Advance Acquisition of Land for Public Purposes*, 42 U.S.C. § 3104 (grants to state and local public bodies and agen-

*some that provide housing for other persons than the poor.*⁴¹

Groups who wish to take advantage of these programs may secure the necessary governmental authorization legislatively, without referendum, even though the programs have both "fiscal" and "non-fiscal" consequences (see Brief for Appellant Shaffer, pp. 33-38) which dwarf those of low-

cies to provide financing for the acquisition of land to be utilized in the future for public purposes); *Highway Planning and Construction*, 23 U.S.C. §§101 *et seq.* (grants to the states for the construction of highways; see Cal. Streets and Highways Code, § 820, §§2200 *et seq.*); *Community Mental Health Centers*, 42 U.S.C. §§2681 *et seq.* (grants for construction of public and nonprofit mental health centers; see Cal. Health and Safety Code §§430, *et seq.*, particularly § 432.9); *Construction and Modernization of Hospitals and Other Medical Facilities*, 42 U.S.C. §§291 *et seq.* (grants and loans primarily to build hospitals and hospital facilities; see Cal. Health and Safety Code, §§430 *et seq.*); *State Mental Retardation Facilities*, 42 U.S.C. §§ 2671 *et seq.* (grants to the states to build facilities to provide services to the mentally retarded; see Cal. Health and Safety Code §§ 430 *et seq.*); *Public Library Construction*, 20 U.S.C. §§ 352-355 (grants to the states to provide public library services; see Cal. Educ. Code § 27053); *Water and Sewer Facilities*, 42 U.S.C. §§ 3101-3102 (grants to governmental bodies or agencies to construct basic water and sewer facilities including water storage, treatment and purification; see Cal. Water Code §§ 13600-13608).

41. See, e.g. *Housing For Educational Institutions*, 12 U.S.C. § 1749 (annual grants and loans to educational institutions to assist in providing housing for students and faculty; California received more federal assistance under this program as of 1968 than any other State in the Union, 1968 HUD STATISTICAL YEARBOOK (G.P.O., No. 1970-0-376-426) [hereafter cited as 1968 HUD STATISTICAL YEARBOOK], 292-294; *Nursing Homes*, 12 U.S.C. § 1715w (mortgage insurance for nursing homes); *Housing Loans for Elderly or Handicapped*, 12 U.S.C. § 1701q; *FHA Insured Property Improvement Loans*, 12 U.S.C. § 1703 (insurance for banks and other financial lending institutions against losses suffered as a result of loans or advances of credit for financing alterations, repairs, or improvements on real property); *VA Home Loans*, 38 U.S.C. §§ 1810, 1811 (loans to veterans to purchase or construct homes; California received more financial aid under this program than any other State as of June 30, 1968, *Progress Report on Federal Housing and Urban Development Programs* (Committee Print, No. 41-369, Subcomm. on Housing and Urban Affairs, Senate Comm. on Banking and Currency, 91st Cong., 2d Sess., March 1970), 167); *FHA Home Mortgage Insurance*, 12 U.S.C. § 1709 (insured mortgage financing

income housing. The federal Urban Renewal⁴² and Model Cities⁴³ programs are obvious examples; appellant Shaffer's argument that local decisions connected with those programs are subject to review referenda under Article 4, § 1 (*id.*, pp. 48-49) is beside the point.⁴⁴ Groups may obtain local participation in these programs through the ordinary legislative channels; only in the case of low-income public housing are those channels blocked by the unique requirement of a mandatory, prior-approval referendum. And, within the field of low-income public housing, that requirement is a one-way roadblock; "a decision . . . not to participate in the federal . . . program," *Avery v. Midland County*, 390 U.S. 474, 484 (1968), needs no referendum.

for the construction, purchase or rehabilitation of one- to four-family homes; through 1968, California ranks highest in the nation for federal financial assistance under this program, 1968 HUD STATISTICAL YEARBOOK, 95-96, 98-99).

42. See 42 U.S.C. §§ 1450-1468a, providing loans and grants to local public agencies to assist in elimination of slums and blighted areas, and to promote redevelopment, rehabilitation, and conservation of such areas by private enterprise. Since 1968, it has been provided that 20% of the units in predominantly residential urban renewal projects will be for low-income persons. 42 U.S.C. § 1455(f).

43. See 42 U.S.C. §§ 3301 *et seq.*, providing grants to enable cities to improve physical environment, improve educational facilities, enhance recreational facilities, improve the quality of urban life, and provide maximum opportunities in choice of housing for all citizens of *all income levels*. As of December 31, 1968, California received more financial assistance under this program than any other state. 1968 HUD STATISTICAL YEARBOOK, 356-357.

44. A mandatory referendum under Article 11, § 18, would be required only if the municipalities undertook to finance these programs by the issuance of their own general obligation bonds, not if (as is usually the case) bonds were issued by the redevelopment authority. For, as appellant Shaffer says (Brief, p. 49), authority bonds are "no charge on, or liability of, the community or burden on the taxpayer"—being, in all regards, exactly like housing authority bonds. See pp. 48-51 *infra*.

B. THE SELECTIVE REQUIREMENT OF PRIOR REFERENDUM APPROVAL FOR DECISIONS TO DEVELOP LOW-INCOME PUBLIC HOUSING CANNOT BE CONSTITUTIONALLY SUSTAINED UNLESS IT IS SUPPORTED BY A COMPELLING STATE INTEREST

The discriminatory incidence of Article 34 just described brings it squarely within the condemnation of *Hunter v. Erickson*, 393 U.S. 385 (1969), under the theories of either the majority or the concurring opinion in that case. Like the open-housing amendment to the Akron City Charter, Article 34

drew a distinction between those groups who sought the law's protection [to provide low-income public housing] ... and those who sought to regulate real property transactions in the pursuit of other ends. Those who sought, or would benefit from, most ordinances regulating the real property market remained subject to the general rule: the ordinance would become effective...after passage by the City Council..., and would be subject to referendum only if 10% of the electors so requested by filing a proper and timely petition. Passage by the Council sufficed unless the electors themselves invoked the general referendum provisions of [Article 4, § 1] But for those who sought protection [of the poor man's interest in adequate housing] ..., the approval of the City Council was not enough. A referendum was required by [Article 34, which] ... obviously made it substantially more difficult to secure enactment of [low-income housing developments] (393 U.S., at 390).⁴⁵

45. This is precisely what the court below held. A. 173-177. Appellants James *et al.* are therefore incorrect that "The test applied below makes it impossible to determine what class of persons are treated differently from those expected to benefit from low-rent housing projects" (Brief, p. 12). The favored class is precisely the favored class defined in *Hunter*: "those who sought to regulate real property transactions in the pursuit of other ends." 393 U.S. at 390.

Article 34, therefore, is not—like Article 4, § 1—an attempt to “allocate governmental power on the basis of any general principle” (*id.*, at 395; Mr. Justice Harlan, concurring). It is designed “with the purpose of assisting one particular group in its struggle with its political opponents” (*id.*, at 393; Mr. Justice Harlan, concurring). Not merely is “the reality . . . that the law’s impact falls on the minority” (*id.*, at 391; majority opinion), but Article 34 has “the clear purpose of making it more difficult for [this minority] . . . to further [its] . . . political aims,” and is “discriminatory on its face” (*id.*, at 393; Mr. Justice Harlan, concurring). *Hunter* plainly answers the argument made in support of Article 34 that the “sovereignty of a State rests in its people [and that the] . . . manner in which they distribute or parcel out its exercise is not a federal . . . question” (Brief for Appellant Shaffer, p. 55; see Brief for Appellants James *et al.*, p. 21):

[I]nsisting that a State may distribute legislative power as it desires and that the people may retain for themselves the power over certain subjects may generally be true, but these principles furnish no justification for a legislative structure which otherwise would violate the Fourteenth Amendment. . . . The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed. Even though [California might have required its municipalities to proceed] . . . by majority vote at town meeting on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person’s vote or give any group a smaller representation than another of comparable size. (393 U.S., at 392-393).

The only comprehensible distinctions of *Hunter* urged by appellants here are (1) that Article 34 in terms discriminates on grounds of poverty, rather than race; and (2) that "[i]f the poor want the affluent to provide them with housing, it would seem only reasonable that they should . . . accept the 'burden' of receiving the willing consent of a simple majority of those persons who are expected to help pay . . ." (Brief for Appellants James *et al.*, pp. 17-18).⁴⁶ But under the Equal Protection Clause, "[l]ines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored," *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 668 (1966); while any notion that discriminations limited to the beneficiaries of public welfare programs may be constitutionally excused on a principle of *noblesse oblige* is unacceptable, *Shapiro v. Thompson*, 394 U.S. 618 (1969). The States may no more wall out the poor than they may wall out the black, see *Edwards v. California*, 314 U.S. 160 (1941); *Shapiro v. Thompson*, *supra*, at 627-631; and it should make no constitutional difference whether they proceed to do so by geographic or by jurisprudential

46. Other distinctions of *Hunter* offered by the appellants also lack merit. It is true that Article 34 repealed nothing (Brief for Appellants James *et al.*, p. 20), but repeal was not the key to *Hunter*. See 393 U.S., at 390 n. 5. It is immaterial that Article 34 "does not address itself to [economic] discrimination" (Brief for Appellants James *et al.*, p. 20), since it addresses itself to, and thwarts, the interests of only one economic class: those whom it explicitly defines as "persons of low income." It is equally immaterial that Article 34 "does not concern itself with legislation" *id.*, p. 19), since surely *Hunter* would outlaw different sets of administrative procedures for whites and blacks, rich and poor. Finally, it is simply wrong that "Here it is not claimed that anything violates the Fourteenth Amendment except the provision for referendum itself" (Brief for Appellant Shaffer, p. 55; emphasis in original). What violates the Fourteenth Amendment here is a *selective* referendum requirement, imposed without justification only upon one outcast group. That was exactly what violated the Fourteenth Amendment in *Hunter*.

gerrymandering. *Cf. Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

Rather, we think it obvious, a selective referendum requirement that makes it "more difficult to enact [housing] legislation in . . . behalf" of poor persons, *Hunter v. Erickson*, *supra*, at 393, must fall under *Hunter* unless both the referendum requirement and its selective application against the poor are "shown to be necessary to promote a *compelling* governmental interest." *Shapiro v. Thompson*, *supra*, 394 U.S., at 634 (emphasis in original). The test of a "compelling" interest, with its attendant principle of "most rigid scrutiny," *Korematsu v. United States*, 323 U.S. 214, 216 (1944), to assure that the interest justifies the lines of disability that the State has drawn, *e.g.*, *Cipriano v. City of Houma*, 395 U.S. 701, 704-706 (1969), is required here for several reasons.

First, Article 34 on its face discriminates against the housing interests of "persons of low income." Poverty is a constitutionally "disfavored" classification, *Harper v. Virginia State Board of Elections*, *supra*, 383 U.S., at 668, whose "suspect" nature requires "exacting judicial scrutiny," *McDonald v. Board of Election*, 394 U.S. 802, 807 (1969); *see e.g.*, *Edwards v. California*, 314 U.S. 160 (1941); *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *In re Antazo*, 3 Cal. 3 100, . . . , 473 P.2d 999, 1005-1006, 89 Cal. Rptr. 255, 261-262 (1970), in "allegiance to the basic command that justice be applied equally to all persons," *Williams v. Illinois*, 399 U.S. 235, 241 (1970). This command is particularly exigent where, as here, what is being denied to the poor is a right of access to normal political channels, *Cf. Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968); *N.A.A.C.P. v. Button*, 371 U.S. 415, 431 (1963); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S.

127, 137-138 (1961)—a right closely akin to that of petition, see *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-462 (1958). Surely, in the political forum as well as in the judicial forum, "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has," *Griffin v. Illinois*, 351 U.S. 12, 19 (1956), quoted in *Williams v. Illinois*, *supra*, 399 U.S., at 241. Poor people are sufficiently disadvantaged in the political arena under circumstances of normal competition; any additional state-imposed burdens directed exclusively at them and making it uniquely difficult for them to advance their interests in that arena call for "a correspondingly more searching judicial inquiry." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-153 n.4 (1938).

Second, as the court below found (A. 176),⁴⁷ the explicit economic discrimination on the face of Article 34 carries with it an implicit racial discrimination when "the reality [of] . . . the law's impact" is considered. *Hunter v. Erickson*, *supra*, 393 U.S., at 391. Racial minority groups, who are disproportionately represented in the class of poor persons needing public housing, are hardest hit by Article 34. Where such racial implications of facially "color-blind" State regulations have appeared, as in *Gomillion v. Lightfoot*, *supra*; *Louisiana v. United States*, 380 U.S. 145 (1965); and *Reitman v. Mulkey*, 387 U.S., 369 (1967), the Court has given those regulations the same "searching judicial inquiry" which footnote 4 of *Carolene Products*, *supra*, suggested was appropriate in all cases of "prejudice against discrete and insular minorities," e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *McLaughlin v. Florida*, 379 U.S. 184, 194 (1964).

Third, exacting scrutiny is demanded in assessing dis-

47. The basis for this finding, and appellant Shaffer's ill-taken criticism of it, are discussed at pp. 65-66 nn. 71-73 *infra*.

criminations that affect "fundamental interests" of citizens. *E.g.*, *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *Shapiro v. Thompson, supra*, 394 U.S. at 634, 638; *Westbrook v. Mihaly*, 2 Cal.3d 765, 784-785, 471 P.2d 487, 500, 87 Cal.Rptr. 839, 852 (1970). The interest of poor persons in decent, safe and sanitary housing, recognized by the United States Housing Act of 1937, is of this fundamental character. It is an interest in the benefits of a federal statute; and the States can hardly be supposed to have the same range of tolerance in drawing regulations whose effect is to grant or deny access to federal benefits, as when only state-created interests are involved. *Cf. Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 3-7 (1964); *Testa v. Katt*, 330 U.S. 386, 389-391 (1947). But the poor man's interest in a habitable house—in a "decent home and suitable living environment"⁴⁸—is fundamental not merely because of its recognition by Congress. It is fundamental because it necessarily underlies interests that this Court has many times found to be fundamental;⁴⁹ and because only blindness could

48. "The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation." Declaration of Policy of the Housing Act of 1949, § 2, 63 Stat. 413, 42 U.S.C. § 1441. The national goal of "a decent home and a suitable living environment for every American family," was reaffirmed in the Declaration of Policy of the Housing and Urban Development Act of 1968, 82 Stat. 476, 42 U.S.C. § 1441a.

49. For example, the interest of the citizen in protecting his home from undesired intrusions, either by government, *see Mapp v. Ohio*, 367 U.S. 643, 660 (1961), or by other individuals, *see Rowan v. United States Post Office Department*, 397 U.S. 728, 736-738 (1970), supposes that he has a home whose quality is worth protecting. The

ignore today the basic, urgent quality of what President Lyndon Johnson called in 1967 "the most pressing unfulfilled need of our society"—the "need . . . to provide the basic necessities of a decent home and healthy surroundings for every American family now imprisoned in the squalor of the slums."⁵⁰

We conclude, then, that Article 34 must be measured by the test of "compelling governmental interest." Under that test, "the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose." *Westbrook v. Mihaly*, 2 Cal.3d 765, 785, 471 P.2d 487, 500-501, 87 Cal.Rptr. 839, 852-853 (1970).

**C. NO CONSIDERABLE STATE INTERESTS SUPPORT ARTICLE 34'S
REQUIREMENT OF PRIOR REFERENDUM APPROVAL ONLY FOR
LOW-INCOME PUBLIC HOUSING**

The several interests advanced by appellants in support of Article 34 plainly fail to sustain a mandatory referendum requirement imposed exclusively upon low-income public housing development. We discuss those interests *seriatim*:

1. The interests in popular democracy and in "local" control.

At the outset, we may quickly put aside the notion, ceaselessly reiterated in appellants' briefs, that Article 34 serves the general interest of grass-roots democracy—"the fundamental policy of California about the supremacy of referendum (Cal. Const., Art. IV, Sec. 1 . . .)." (Brief for Appellant Shaffer, p. 35; *see id.*, pp. 6-7, 18, 22-24, 34-35, 54-61; Brief for Appellants James *et al.*, pp. 13-14, 16-18.) That policy might support the subjection of low-income public housing

importance laid upon a range of constitutional protections of family life, *Griswold v. Connecticut*, 381 U.S. 479, 482-485 (1965), and cases cited, involves the same assumption.

50. PRESIDENT'S COMMITTEE ON URBAN HOUSING, REPORT (A DECENT HOME) (G.P.O. No. 1969-0-313-937, 1968) [hereafter cited as A DECENT HOME], 1.

decisions to the sort of review referenda authorized by Article 4, § 1 (see pp. 29-31 *supra*); but it can hardly support the imposition of a distinctly different referendum requirement—the requirement of a mandatory prior-approval referendum—*only* upon low-income public housing decisions (see pp. 31-38 *supra*). Characterization of Article 34 as a “re-affirmation [of] . . . ancient policies of universal application” (Brief for Appellant Shaffer, p. 18) treats it, inaccurately, as though it provided that public housing decisions should be referable under Article 4, § 1. Of course it does not; and the special “more difficult” referendum which it does require exclusively for low-income public housing (*Hunter v. Erickson*, *supra*, 393 U.S., at 390, 393) can no more be justified by a general concern for “democracy” than could a provision forbidding low-income people to lobby at city hall.

We do not understand how concern for “local” autonomy in public housing matters (Brief for Appellant Shaffer, p. 54; Brief for Appellants James *et al.*, p. 14) supports Article 34. Local autonomy is completely preserved by the requirement that the local governing body give three kinds of approvals to every federally-funded low-income public housing development in California (see pp. 10, 12-13 *supra*). This case does not present the question whether California could require that those local approvals be given by the voters at the polls, rather than by their elected representatives, if decisions of that sort were generally referred to the polls under procedures “grounded in neutral principle” (*Hunter v. Erickson*, *supra*, 393 U.S., at 395; Mr. Justice Harlan concurring) and not particularized—as is Article 34—“with the purpose of assisting one particular group in its struggle with its political opponents” (*id.*, at 393; Mr. Justice Harlan, concurring).

2. “Fiscal interests.

Appellants make much of the monetary costs which public housing is said to impose upon the locality in which it is built.

(Brief for Appellants James *et al.*, pp. 14-15; Brief for Appellant Shaffer, pp. 18-19, 33-35). While we think that such costs are grossly exaggerated,⁵¹ we do not deny that they exist. All government programs cost money. The point, however, is that the monetary costs of low-income public housing do not differ in either nature or degree from the costs that local governments in California can and do incur daily, by a variety of legislative enactments, without necessity of a mandatory referendum.

The only two local costs of federally-funded low-income housing identified by the appellants—and the only two “cost” items that are not fully covered by federal funds (see pp. 7-12 *supra*)—are (a) the cost of providing municipal services, and (b) the loss of property-tax revenues in excess of 10% of shelter rents. Of course, exactly the same sorts of “costs” will be incurred if the local governing body decides to build a new municipal auditorium, hospital, parking garage, ball field, swimming pool, etc., or to clear the way by zoning and planning changes for any private development of tax-exempt uses: churches, colleges, museums, libraries, and the like. If zoning and planning changes are unnecessary, private citizens in California may unilaterally devote their lands to tax-free uses (including those which require increased municipal services) without any sort of local govern-

51. The major local “cost” item, loss of property tax revenues, is calculated by appellant Shaffer (Brief, p. 35) on the assumption that the property upon which the low-income project is constructed would have produced substantial collectible tax revenues if left to other uses. Of course, this is frequently not true of land on which low-income public housing is built. Appellant Shaffer also seems to assume that any other use of the property would make smaller demands for local services than will low-income public housing. There is no basis for such an assumption. Indeed, by reducing slum living conditions, low-income public housing may significantly decrease community-wide costs of police, fire and other services.

mental control;⁵² and the State, or a state agency, may acquire land for tax-exempt uses in a city or county without a by-your-leave to the local taxing authorities or to the local tax-payers.⁵³ The plain fact is that California law is generally unconcerned with *any* local control over the loss of tax-ratable property (unless low-income public housing tenants are going to live there); and it leaves to local legislative competence *every* form of municipal development which may entail increased service needs (except when provision of those services is going to be made to low-income public housing tenants). Matters of this sort have never been the subject of "fiscal control" (Brief for Appellant Shaffer, p. 33) by mandatory referenda in California.

To the contrary, as we have noted at pp. 32-33 *supra*, the single instance in which a mandatory referendum has traditionally been required as a check upon local fiscal management in California is when a local governmental entity having taxing power incurs a long-term indebtedness under a general obligation bond. This is the situation defined in Article 13, § 40 (formerly Article 11, § 18) of the State Constitution, as consistently construed by the California courts.⁵⁴

52. Numerous tax exemptions, the creatures of state law, are described in note 8 *supra*.

53. Cal. Const. Art. XIII, § 1; Cal. Rev. & Tax Code § 202. See *Hall v. City of Taft*, 47 Cal. 2d 177, 183-184, 302 P.2d 574, 578-579 (1956); *Baldwin Park County Water Dist. v. County of Los Angeles*, 208 Cal. App. 2d 87, 94-97, 25 Cal. Rptr. 167, 172-173 (1962).

54. Certain provisions of general state law permit, but do not require, municipalities to hold prior referenda in connection with other forms of bond financing. See Cal. Gov't Code §§ 54380, 54478. These referendum provisions are optional with local charter governments. *City of Santa Monica v. Grubb*, 245 Cal. App. 2d 718, 54 Cal. Rptr. 210 (1966). Charter cities may also require mandatory referenda in situations where the general state law does not. For example the Charter of the City of San Jose (1965), §§ 1220-1223 requires prior referendum approval for the issuance of revenue bonds for certain municipal services. Compare text *infra*.

Appellant Shaffer argues that the case of *Housing Authority v. Dockweiler*, 14 Cal.2d 437, 94 P.2d 794 (1939), wrongly excluded housing authority bonds from the referendum requirement of former Article 11, § 18, and that Article 34 had to be adopted to "rectify this erosion with respect to low rent public housing projects . . . [so as] to bring housing within the traditional controls" (Brief for Appellant Shaffer, p. 34; see Brief for Appellants James *et al.*, pp. 13-14). Under clear and settled state law, however, housing authority bonds could not conceivably have been supposed to come within former Article 11, § 18. Other bonds identical to housing authority bonds in terms of the character of the debtor and the debt have never been required, and are not today required, to go to mandatory prior referendum under that section, because such bonds are wholly outside the concerns of the section.

Former Article 11, § 18 (which remains identical as presently renumbered) provides that "no county, city . . . or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year," without prior referendum approval." "It is settled in California and recognized in almost all of the other states that, as a general rule, a constitutional provision such as Section 18 of article XI is not violated by revenue bonds or other obligations which are payable solely from a special fund, provided the governmental body is not liable to maintain the special fund out of its general funds, or by tax levies, should the

55. The section in terms requires approval by a two-thirds vote, but this extraordinary-majority provision was held federally unconstitutional in *Westbrook v. Mihaly*, 2 Cal. 3d 765, 471 P.2d 487, 87 Cal. Rptr. 839 (1970).

special fund prove insufficient." *City of Oxnard v. Dale*, 45 Cal. 2d 729, 733, 290 P.2d 859, 861 (1955). Thus, only obligations which amount to a *general indebtedness* on the part of a *tax-assessing political subdivision* fall within the constitutional limitation. See *City of Redondo Beach v. Taxpayers*, 54 Cal. 2d 126, 352 P.2d 170 (1960).

In the *Dockweiler* case, *supra*, the California Supreme Court first noted that housing authority bonds are a debt solely of the issuing authority, and are not debts of the State or of any political subdivision to which the debt limitation provision of the Constitution is applicable. The statute declares "that such bonds do not impose any liability on any person or political subdivision of the state. In fact, . . . our statute also requires the bonds to state on their face that they do not constitute a debt of the city, county, state or any other political subdivision thereof." 14 Cal.2d, at 459, 94 P.2d, at 806; see Cal. Health and Safety Code, § 34353. "However, even if it were assumed that housing authorities are subject to the debt limitation provision of the Constitution, its bonds being payable exclusively from the revenues or property of the project or projects which are constructed with their proceeds and with federal aid, would not constitute a debt within the meaning of the provision." 14 Cal.2d, at 460, 94 P.2d, at 806. See 14 Cal.2d, at 444-445, 94 P.2d, at 798; Cal. Health and Safety Code, § 34351. In short, *Dockweiler* created no "erosion"; the "traditional controls" of Article 11, § 18, have nothing to do with bonds like those which California housing authorities may issue;⁵⁶

56. *City of Palm Springs v. Ringwald*, 52 Cal. 2d 620, 624-625 n. *, 342 P.2d 898, 901 n. * (1959), sets out cases in which Article 11, § 18 was held inapplicable since the bonds were payable out of funds of the project benefited, and not from the general funds of a governmental body. *Dockweiler* is just one of the many cases cited.

In *Ryan v. Riley*, 65 Cal. App. 181, 190 [223 P. 1027], the

Article 34 is manifestly not framed on a theory of "fiscal control" relating to these authorities;⁵⁷ and, if it were, its selective application of popular "fiscal control" to expenditures for low-income housing, as distinguished from other expenditures which do not involve general public indebtedness, would nonetheless remain invidious and a violation of Equal Protection.

Motor Vehicle Department benefited; the special fund was derived solely from the use of highways. In *Shelton v. City of Los Angeles*, 206 Cal. 544, 546 [275 P. 421], the department of water and power benefited; the special fund was provided from revenue derived from the department of water and power. In *In re California Toll Bridge Authority*, 212 Cal. 298, 301 [298 P. 485], the Toll Bridge Authority benefited; the special fund was provided from revenues collected as tolls by the Toll Bridge Authority. In *California Toll Bridge Authority v. Kelly*, 218 Cal. 7, 13 [21 P.2d 425], the special fund was provided from tolls to be collected from use of a particular bridge for which bonds were issued. In *Department of Water and Power of the City of Los Angeles v. Vroman*, 218 Cal. 206, 211, 217 [22 P.2d 698], power facilities of the city benefited; the special fund was derived from the sale or use of electricity. In *Housing Authority v. Dockweiler*, 14 Cal. 2d 437, 460 [94 P.2d 794], the Housing Authority benefited; the revenue was derived from the housing project and any annual contributions made by the federal authorities to the Housing Authority. In *City of Glendale v. Chapman*, 108 Cal. App. 2d 74, 76, 79 [238 P.2d 162], existing waterworks benefited; the special funds were supplied by revenue collected by the waterworks. In *Board of State Harbor Commissioners v. Dean*, 118 Cal. App. 2d 628, 631 [258 P.2d 590], the San Francisco Harbor benefited; the special fund was provided from revenue derived from harbor facilities. In *City of Oxnard v. Dale*, 45 Cal. 2d 729, 732 [290 P.2d 859], a sewer system benefited; the special fund was derived from the gross revenues from the sewer system.

57. If Article 34 had been concerned with housing authority debt on the theory that *Dockweiler* wrongly released public housing from the "fiscal control" of former Article 11, § 18, the new Article obviously would have required a two-thirds vote to approve the assumption of indebtedness by the authorities, as Article 11, § 18 required for assumption of general public debt. See note 55, *supra*.

3. "Non-fiscal" interests.

Appellant Shaffer has collected a number of "non-fiscal" considerations which are said to support the requirement of a mandatory referendum only upon low-income public housing projects (Brief for Appellant Shaffer, pp. 19, 35-38; *cf.* Brief for Appellants James *et al.*, p. 14). Basically, the argument is that voters should have the right to reject projects of "institutional design and mammoth size"; projects which "tend to perpetuate rather than overcome racial segregation;" and "large concentrations of low-income housing" which create a "'central city' divorced from its surroundings" (Brief for Appellant Shaffer, p. 36).

Low-income public housing construction—like almost any sort of construction—may, of course, be badly planned or built. That concern, however, furnishes no conceivable justification for Article 34.

First, public housing projects are "subject to the planning, zone, sanitary, and building laws, ordinances, and regulations applicable to the locality in which the housing project is situated."⁵⁸ Such regulations provide ample controls against bad construction features. Article 34 does not. Article 34, notably, requires no vote on *rich* constructions having undesirable physical or planning features: high-rise luxury apartments, for example. It requires a vote on all public housing projects for the *poor*, whatever their physical or planning features. Even were the danger far greater than it is that low-income public housing would be over-sized and ill-planned, that danger calls only for enforcement of the applicable size and planning controls, not for controls defined in terms of the income level of residents.

58. Cal. Health and Safety Code § 34326. See Low-Rent Housing, Preconstruction Handbook, A HUD HANDBOOK (RHA 7410.1, June 1969) Chap. 3, § 1, 3.

But the danger is inconsiderable, except to the extent that it is caused by Article 34 and the prejudices which Article 34 expresses. In the Housing and Urban Development Act of 1968, Congress has ordered that, other than housing which is predominantly for the elderly, "the Secretary shall not approve high-rise elevator projects for families with children, unless he makes a determination that there is no practical alternative" (42 U.S.C. § 1415 (11)). Scattered sites are encouraged by HUD. Low-Rent Housing, Preconstruction Handbook, A HUD HANDBOOK (RHA 7410.1, June 1969), Chap. 1, § 1, 2d (2)). "We have moved away from the massive, monolithic buildings of the past. We are now . . . emphasizing small projects and individual units."⁵⁹ Congress has also declared that, in the administration of its financially assisted housing, "emphasis should be given to encouraging good design as an essential component of such housing, and to developing housing which will be of such quality as to reflect its important relationship to the architectural standards of the neighborhood and community in which it is situated, consistent with prudent budgeting" (12 U.S.C. 1701v (1968)).⁶⁰

59. Testimony of Robert C. Weaver, Secretary of HUD, in *Hearings on Proposed Housing Legislation for 1968, Before Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 2d Sess. (1968), 10.

60. See HUD Circular, *Quality in Public Housing*, unnumbered (Feb. 13, 1969). HUD has also implemented a program of design awards for federally financed housing, which serves as an incentive "for the community as a whole." *Hearings on Proposed Housing Legislation for 1968, Before Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong. 2d Sess. (1968), 248; 1968 HUD Awards For Design Excellence (G.P.O. No. 1968-0-320-834). In recent years, HUD has been given substantial recognition for its efforts to control high-rise and concentrated units, and to encourage good design and management. A DECENT HOME, at 61.

Further, HUD has an express policy of affording members of minority groups an opportunity to locate outside of areas of racial concentration. Indeed:

Any proposal to locate housing only in areas of racial concentration will be *prima facie* unacceptable and will be returned to the Local Authority for further consideration and submission of either (1) alternative or additional sites in other areas so as to provide more balanced distribution of the proposed housing or (2) a clear showing, factually substantiated, that no acceptable sites are available outside the areas of racial concentration. (Low-Rent Housing, Preconstruction Handbook, A HUD HANDBOOK (RHA 7410.1, June 1969), Chap. 1, §1, 2.g.)

It is not federal policy that aggravates "prevailing patterns of racial segregation." (Brief for Appellant Shaffer, p. 36). It has rather been the implementation of exclusionary weapons such as Article 34.⁶¹ "Nonghetto areas, particularly suburbs, for the most part have steadfastly opposed low-income, rent-supplement, or below-market interest rate housing, and have successfully restricted use of these programs outside the ghetto." NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT (Bantam ed. 1968) [hereinafter cited as KERNER COMMISSION], 482.

The general tendency in recent years on the part of too many public housing authorities has been to emphasize high-rise and large-scale apart-

61. The San Jose housing development that was defeated in an Article 34 referendum in 1968 would have scattered 1000 low-income units throughout the city in order "to avoid racial and economic segregation." (A. 56.) The units were designed to avoid high population density: no more than four were to be situated in any building, nor more than one four-unit building on any lot. (A. 29.) In short, the project contained none of the objectionable features that appellant Shaffer describes, but it lost at the polls.

ment projects. This trend has been caused by many factors, notably the refusal of the dwellers in the suburbs and in the outer and middle-class sections of the cities to accept public housing. This, in turn, has driven public housing closer to the center of the cities where land costs are high. The high cost of land and the continued immigration of low-income families have then led public housing authorities to construct high-rise buildings in order to get as many housing units as possible on each acre of land. . . . Suburbanites and middle-class residents who criticize the huge projects in the central city and who, at the same time, oppose any projects in their neighborhoods, should realize that their refusal to permit the diffusion of public housing is a major factor in creating the concentration they deplore. (NATIONAL COMMISSION ON URBAN PROBLEMS, REPORT (BUILDING THE AMERICAN CITY), H. Doc. No. 91-34, 91st Cong., 1st Sess. (1968) [hereafter cited as DOUGLAS COMMISSION], 123.)

Thus, if related at all to the problem of "mammoth" public housing developments and attendant ills, Article 34 is a contributing cause, not a solution, of these evils. "[T]he removal of existing constraints on freedom of location—such as racial discrimination . . . is essential to the achievement of decent housing for all. Strong measures should be taken to remove barriers which prevent ghetto dwellers from leaving the ghetto." A DECENT HOME, at 70.

Artificial restrictions which restrict the location of subsidized housing should be eliminated so that recipients of assistance would have the widest possible choice of where to live. . . . Merely enforcing the Federal open housing provisions of the Civil Rights Act of 1968, though important, will not be enough to assure freedom of location. It serves very little purpose to tell a poor person he can move

into a \$50,000 house wherever it may be located; we must allow for an adequate supply of housing for low- and moderate-income families in all parts of our metropolitan areas. (A DECENT HOME, at 47-48.)⁶²

As for the other "major sociological effects" of public housing developments (Brief for Appellant Shaffer, p. 38) we see no basis in them for a discriminatory referendum requirement leveled only against the poor. All governmental programs in our complicated urban culture have major sociological effects. Yet only low-income public housing, which threatens to mix the poor with the rich and the black with the white, has the kind of effects with which the sociology of Article 34 is concerned. We certainly do not quarrel with the several criticisms of public housing made by the report, *MORE THAN SHELTER*, that is cited in Appellant Shaffer's Brief, p. 38.⁶³ More relevant than those criticisms is the report's conclusion that:

62. See [CALIFORNIA] GOVERNOR'S ADVISORY COMMITTEE ON HOUSING PROBLEMS, REPORT (HOUSING IN CALIFORNIA) (1963) [hereafter cited as *HOUSING IN CALIFORNIA*], 39, Appendix 124.

63. It is unquestionably true that, too often, public housing has not done enough to improve the lives of low-income tenants. The Federal Government has recently taken strides in this direction.

For public housing to meet its full responsibility toward those with the lowest incomes, it must provide more than shelter. Equally it must help residents improve their economic status. And in many cases it must foster adjustments to urban life . . . Many local housing authorities have endeavored, with limited resources, to assist these families by counseling and referral to community agencies that could help them.

Unfortunately, the funds available to the local housing authority have generally been inadequate to perform these much needed services. We are therefore recommending, as provided in section 204 of the bill, that authority be given to make annual grants to housing authorities to assist them, where necessary, to carry out these much

Active opposition, obstructionism, . . . at state and local levels have been even more responsible for failure to improve housing conditions than the above-mentioned shortcomings of the Federal establishment. (MORE THAN SHELTER, Research Report No. 8, for the National Commission on Urban Problems (1968) [hereafter cited as MORE THAN SHELTER], 69.)

It is accordingly ironic that Article 34, a legal bastion of obstructionism, is now sought to be justified upon the ground that the federal housing program—and it alone of all government schemes—has proved too risky and equivocal “sociologically” to import into a community by mere governmental action, without a popular plebiscite.

4. *Promoting consideration of alternative programs.*

Appellant Shaffer suggests that there are “other federal housing programs” which “offer significant alternatives” to public housing, and that Article 34 is warranted because

needed programs of tenant services. (Testimony of Robert C. Weaver, Secretary of HUD, in *Hearings on Proposed Housing Legislation for 1968, Before Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 2d Sess. (1968), 10-11; see also *Low-Rent Housing, Preconstruction Handbook*, A HUD HANDBOOK, (RHA 7410.1, June 1969), Chap. 3, § 4 (Community Wide Planning To Meet All Needs).)

Financial support for tenant services has indeed been provided, and preferential treatment is given to programs which involve “maximum feasible participation of the tenants in the development and operation of such tenant services” (42 U.S.C. § 1415 (10)). The law defines tenant services as including counseling on household management, housekeeping, budgeting, money management, child care, advice as to resources for job training and placement, education, welfare, health and other community services; services which are directly related to meeting tenant needs and providing a wholesome living environment. *Ibid.*

"[r]ejection of a project forces authorities to face the issues of curative relief through the use of new approaches." (Brief for Appellant Shaffer, pp. 39-40; *see also* Brief for Appellants James *et al.*, pp. 15-16.) Like the previous governmental "interests" conjured up in support of Article 34, this one fits the Article very badly. There are, of course, "significant alternatives" to every governmental program; if mandatory referenda were required whenever legislative or administrative choice had to be made among "significant alternatives," California would be referendum-ridden to a standstill. Article 34, however, is concerned *only* with "alternatives" to public housing for persons of low income. "Characterizing it simply as a public decision to move slowly in [this] . . . delicate area . . . emphasizes the impact and burden of [Article 34] . . . , but does not justify it." *Hunter v. Erickson supra*, 393 U.S., at 392.

While *Hunter* thus completely answers this point, we think it would be unfortunate if the Court were left with the false impression, factually, that "other federal housing programs" *do* "offer significant alternatives to public housing" in the sense that appellant Shaffer asserts. In many localities (and, particularly, in San Jose and San Mateo Counties) they simply do not. A brief description of each of these programs will indicate why—however desirable they may be—they are often altogether useless as a means of filling the basic low-income housing need served by direct construction of public housing.

a. *The Leased-Housing Program.* Described by Congress as "supplementary" to the provisions in the 1937 Act providing for direct construction (42 U.S.C. § 1421b(a)(1)), the leased-housing program depends upon availability of an adequate pool of privately built, rentable, cheap, decent, safe,

and sanitary housing.⁶⁴ The record shows clearly that this program has not worked to meet the need for low-cost housing (A. 21-22, 31, 61, 123-124), for several reasons: (1) high rentals in privately constructed housing, which the Housing Authority cannot afford even with federal subsidy (A. 22, 24, 157-159); (2) unavailability of units because of the low vacancy factor (A. 31, 61, 124, 143); (3) refusal of local governments to allow the leasing program to operate (A. 31; *Draft, The Housing Situation: 1969*, p. 84: A. 123); and (4) refusal of owners to rent to the Housing Authority, sometimes based on unwillingness to rent to racial minorities (A. 140). The Directors of the Housing Authorities of Fresno, Sacramento, Santa Clara, and San Mateo, men charged with responsibility for providing housing for more than 7,000 poor families, state unequivocally that they need relief from Article 34 to do the job, so that their respective authorities can construct the necessary units. Each now uses the leased housing program, but all agree that that program cannot fulfill the need and that it can serve only as a supplementary program to direct construction. A. 21-22, 24, 31-33, 122-124; see also A. 157-159.

Appellant Shaffer is incorrect in asserting that the San Jose Housing Authority has nearly 2,000 leased units (Brief for Appellant Shaffer, p. 40). The number of 1933 units cited in the Lockfeld affidavit (A. 61) is the combined figure for the San Jose and the Santa Clara Housing Authorities; Mr. Lockfeld expressly states that the Authorities cannot succeed in finding enough units to reach the authorized maximum set by HUD (*ibid.*); and, while "1,071 additional families are eligible for housing, and 782 are pending eligibility clearance," there is no available housing for them (*ibid.*).⁶⁵

64. The program is described at p. 7 n. 6 *supra*.

65. Leased housing presents a further problem in California.

b. *Section 236 and the Rent Supplement Program.* In 1968, Congress enacted § 236 of the Housing Act, providing interest reduction payments on mortgages for nonprofit or limited profit sponsors, as incentives to build privately financed moderate-low-income projects (12 U.S.C. § 1715z-1). *See Rental Housing for Lower Income Families* (Section 236), A HUD HANDBOOK (FHA 4442.1, Oct. 1968). However, rent-supplement payments are necessary for persons of low income to afford to live in § 236 projects; and these are authorized for only 20% of the units.⁶⁶ As a result, § 236 housing is reserved primarily for moderate-income persons. DOUGLAS COMMISSION, 174. "Except in few cases, families with incomes below \$4,000 cannot take part in the new interest rate subsidy program. For families at or below the poverty level, public housing still is the major effective program." *Ibid.* "Their needs will have to be met through other means, primarily through public housing . . . if it is to be met at all." *Ibid.*

Moreover, § 236 is (i) inadequately funded, *see* Sloane, "Toward Open and Adequate Housing," 1 Civil Rights Digest, No. 3, pp. 1, 7 (U.S. Commission on Civil Rights, 1968); *Progress Report on Federal Housing and Urban Development Programs* (Committee Print, No. 41-369, Subcomm. on Housing and Urban Affairs, Senate Comm. on Banking & Currency, 91st Cong., 2d Sess., March 1970) [hereafter cited *Progress Report*], p. 24; and (ii) dependent for its imple-

While the State Attorney General has ruled that the program does not require voter approval under Article 34, 47 Ops. Cal. Atty. Gen. 17 (1966), this question has never been litigated. The leased housing program may be judicially held subject to Article 34, which, by its language, encompasses all low-rent housing "developed, constructed or acquired in any manner" by the Housing Authority. And, of course, if Article 34 can constitutionally be applied to direct construction, it can constitutionally be made applicable to leased housing as well.

66. See pp. 7-8 n. 6 *supra*.

mentation on the local existence, vigor, initiative, and resources of nonprofit or limited profit sponsors. The scarcity of all of these quantities seriously handicapped the predecessor to § 236, the § 221(d)(3) program. *See DOUGLAS COMMISSION*, 148. Apart from its application in § 236 projects, the entire rent supplement program is dependent on private sponsors; this and other drawbacks severely limit its utility. Welfeld, *Rent Supplement and the Subsidy Dilemma: The Equity of a Selective Subsidy System*, 32 *LAW & COMTEMP. PROB.* 465 (1967).

c. *Section 235.* Although not mentioned by appellants, one other federal housing program merits note. This is the § 235 program, titled Homeownership for Lower-Income Families, which was authorized by the 1968 Housing and Urban Development Act (12 U.S.C. § 1715z). Under § 235, mortgage loans are made by private lenders to lower-income families at market rates of interest; HUD makes periodic payments to the lenders to reduce the mortgage interest rate. The amount of the mortgage cannot exceed \$18,000 (or, in some circumstances, \$21,000 in high-cost areas), 12 U.S.C. § 1715z(b)(2),(i)(3), including closing costs; and the minimum down payment by the family is \$200, Homeownership for Lower Income Families (Section 235), *A HUD HANDBOOK* (FHA 4441.1, Oct. 1968), 7-9. This program also principally benefits the moderate-income family. Low-income families such as the appellees cannot afford \$200 for a down payment. Nor can they afford home ownership, since the federal mortgage reduction payments do "not include the cost of property maintenance and repairs, heating, electricity and fuel, and similar expenses." *Id.*, at 16.⁶⁷ In addition, (i) as the record

67. The asset limitations defined for participation in the program make it clear that the intended beneficiaries are in a higher income bracket. A family of 4 for instance could have assets of \$4,000. *Id.*, at 13.

shows, there is a shortage of houses available for \$21,000 or less (A. 59; cf. A. 123, 125, 157); and (ii) the § 235 program suffers the additional malady of § 236: inadequate funding. *Progress Report*, 23.

Examination of these several "alternatives" to low-income public housing merely underscores the plight of the very poor. For them, in many localities, direct construction of public housing developments remains the single hope of a decent home and a suitable living environment. Article 34 selectively removes from local government the power to undertake this single program. It requires the poor, and the poor alone, to bear the burden of a mandatory referendum before government may act in their behalf. It is discriminatory on its face; it is unjustified by any of the excuses proffered to condone the discrimination; and it violates the Equal Protection Clause of the Fourteenth Amendment, as the court below held.

II

Article 34 Also Violates the Equal Protection Clause Because It Authorizes and Encourages a Racial Veto Over the Distribution of Federal Funds for Public Housing

The highly selective coverage of Article 34 and the hollowness of the reasons put forward to justify its unique classification (pp. 45-58 *supra*) should leave no doubt concerning its actual design and function. This will not be the first time that racial discrimination has come to this Court dressed in trappings of concern for "property values" and local "self-determination" of property uses. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Reitman v. Mulkey*, 387 U.S. 369 (1967). See the *Los Angeles Times* editorial in support of Article 34 at p. 15 n. 9 *supra*; see A 122, 127, 132-133; and see *HOUSING IN CALIFORNIA*, 42.

Racist fear of residential integration is perhaps the most deep-seated form of this tragic American sickness, as the Court recognized in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438-444 (1968). See, e.g., *Buchanan v. Warley*, 245 U.S. 60 (1917); *Barrows v. Jackson*, 346 U.S. 249 (1953); *Hunter v. Erickson*, *supra*; *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). While the Justices have sometimes disagreed as to whether it is legally curable in its purely private form, *ibid.*, there has never been a question that its legitimation by any form of governmental authority is unconstitutional. E.g. *Buchanan v. Warley*, *supra*; *Shelley v. Kraemer*, *supra*; *Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970); *Gautreaux v. Chicago Housing Authority*, 296 F.Supp. 907, 304 F.Supp. 736 (N.D. Ill. 1969); *Hicks v. Weaver*, 302 F.Supp. 619 (E.D. La. 1969); *Kennedy Park Homes Assn., Inc. v. City of Lackawanna*, 39 U.S. L. Week 2124 (W. D. N. Y., August 13, 1970); *Banks v. Housing Authority of San Francisco*, 120 Cal.App. 2d 1, 260 P.2d 668 (1953). American government may neither put race on the agenda as a basis for private decision-making, *Anderson v. Martin*, 375 U.S. 399 (1964), nor confer government's ordinary decisional powers upon private parties in a form that authorizes and condones racism in their exercise, *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry V. Adams*, 345 U.S. 461 (1953).

Article 34 does both of these things. To be sure, it does not speak of race in terms. But the Constitution "nullifies sophisticated as well as simple-minded modes of discrimination," *Lane v. Wilson*, 307 U.S. 268, 275 (1939); and, once Article 34 is considered in context, "the conclusion [is] . . . irresistible"⁶⁸ that it is simply a means of creating a white middle-class veto over black and brown, lower-class immi-

68. *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960).

gration into the traditional havens of residential segregation. The Article can have no other conceivable function or effect.

We have already shown that there is no warrant or explanation for Article 34 in any general, nondiscriminatory policy of California government. This unusual, highly selective abrogation of governmental power is explicable only as an exclusionary device by which local communities can be assured that they will not find themselves suddenly at home with the unwanted, unwashed populations of low-income public housing projects.

The opposition to public housing, based on a four-fold set of objections, has been strong almost from its beginning in this country. It is compounded of several elements: (a) a dislike of public activity in such an intimate family matter as housing; (b) the fear of undue government expenditures; (c) a desire to keep the poor physically at a distance; and (d) deep racial prejudices on the part of some whites. The latter two deserve special attention. They are evident almost everywhere in this country. Public housing is by definition and intent housing for the poor. About one-third of the urban poor are nonwhite, and more than half of the families in public housing are black. Thus these two major sources of opposition combine and fuse into a so far unyielding roadblock. (DOUGLAS COMMISSION 129.)

Manifestly, Article 34 is not framed on a general theory of "dislike of public activity in . . . housing",⁶⁹ nor a fear of undue governmental expenditures.⁷⁰ It is framed exclusively

69. This concern would equally condemn all public housing projects in a locality. But Article 34 is fashioned to permit the voters to pick and choose on a project-by-project basis.

70. See pp. 46-51 *supra*.

as a portable "off-limits" sign against the poor, non-white minority.

And, as the court below found, this is its effect: "the impact of the law falls upon minorities." (A. 176.)⁷¹

71. Appellant Shaffer attacks this finding, as follows: She first cites special census figures purporting to show that in 1966, in the City of San Jose, 1.4% of households with income below \$3,000 were black (citing KAISER ENGINEERS, HOUSING STUDY: PHASE I—PUBLIC HOUSING, FOR CITY OF SAN JOSE, CALIFORNIA (Report No. 70-10-R, March 1970), V-2); she then compares this figure with an affidavit (A. 32) which establishes that blacks were "slightly more than 1%" of the Santa Clara population in 1969; and she thereupon concludes that "poverty does not equal race in San Jose or Santa Clara County" (Brief for Appellant Shaffer, p. 30). This attack is (a) improper; (b) unsound; (c) unmathematical; and (d) irrelevant:

(a) It is improper because it goes outside the record. The KAISER document is not in evidence and—as a private contract study—is not judicially noticeable. In addition, appellant Shaffer reports its contents selectively, with a significant omission. The 1.4% figure appears on p. V-2; however, immediately thereafter, on p. V-3 appears the author's own interpretation: "Information gathered from the Model Cities Program and local realtors indicates that the disproportionately larger number of low income minority households remains approximately the same in the city today" (emphasis added).

(b) It is unsound because it purports to compare noncomparable figures: percentages for 1966 with 1969; San Jose City with Santa Clara County; and households with persons.

(c) It is unmathematical because it insinuates that a group which is 1% of the total population but 1.4% of the poor population is "no poorer than the population as a whole." That conclusion depends upon the characteristics of the total population in consideration, but will very probably be wrong most of the time. Assume, for example, a total population of 300,000 persons. (We do not know what the actual figures were in the census reported by KAISER.) A black percentage of 1% would be 3,000 persons. Now, if 20% of the total population were poor (60,000), and if 28% of the black population were poor (840), blacks would be 1.4% of the poor population. Or, if 33% of the total population were poor (100,000) and if 47% of the black population were poor (1,400), blacks would be 1.4% of the poor population. Or if 50% of the total population were poor (150,000), and if 70% of the black population were poor (21,000), blacks would be 1.4% of the poor population.

(d) It is irrelevant because the court below was not considering the question—as appellant Shaffer prefers to do—only in the context of the City of San Jose. The court was considering a constitu-

Inevitably, this law's impact falls upon minorities, both because minorities are disproportionately represented among poor persons⁷² needing public housing⁷³ and because endemically a referendum works to the minority's disadvantage.⁷⁴ This is particularly the case when the issue posed by the referendum goes to the heart of the question whether residential segregation should be preserved, and when there is no other apparent reason why public housing projects go to the polls. The rhetoric of Article 34—exactly like that of Proposition 14 considered by this Court in *Reitman v. Mulkey*,

tional provision of state-wide application, and had before it (a) affidavits relating to both San Jose and San Mateo County (see note 73 *infra*), and (b) judicially noticeable materials, brought to its attention in briefing below, relating to California and the Nation (see notes 72-73 *infra*). It cites Santa Clara County statistics in support of the proposition that it is "increasingly clear" that minority groups comprise the poor. (A. 176 n. 2.) *And see Southern Alameda Spanish Speaking Organization v. City of Union City*, 424 F.2d 291, 296 (9th Cir. 1970), judicially noticing the same indisputable point.

72. "In both 1968 and 1959 the poverty rate among persons of Negro and other races was about three times the rate among whites." UNITED STATES BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS (Series P-60, No. 68), *Poverty in the United States: 1959 to 1968* (G.P.O., December 31, 1969), 1. *And see, e.g.*, DOUGLAS COMMISSION 45: "In 1967, 41 percent of the nonwhite population was poor, compared with 12 percent of the white population. Nonwhites thus constitute a far larger share of the poverty population (31 percent) than of the American population as a whole (12 percent). Moreover, the nonwhite proportion of the poverty population has been increasing, slowly but steadily, since the first racial count was made in 1959; it was 28 percent then, and 32 percent by 1967."

73. *See, e.g.*, MORE THAN SHELTER 35 ("In proportion to their numbers among low-income families, more nonwhites than whites live in public housing"); A DECENT HOME 42 ("The nationwide proportionate need among nonwhites will be almost three times more acute than among the white majority"). *See also* DOUGLAS COMMISSION 114; KERNER COMMISSION 467-474; HOUSING IN CALIFORNIA 38-42; A. 61-62, 126, 128, 133, 138, 143-144, 148, 154-155; *Draft, The Housing Situation: 1969*, pp. 49-53.

74. *See Hunter v. Erickson*, *supra*, 393 U.S., at 391.

387 U.S. 369 (1967)⁷⁵—is of course, that the community should have “the right to determine its own future course.”⁷⁶ Yet the voter knows that his elected representatives are permitted to steer the community’s course in all other matters of similar import, and that his vote is required only in this instance where an influx or relocation of minority people is at stake.

We submit that Article 34 is unconstitutional because, in this setting, it unmistakably authorizes and invites a racial veto within the administration of a governmental benefit program. Surely, Article 34 is far less “neutral” than was Proposition 14. For, while Proposition 14 might possibly have been perceived as nothing more than a governmental decision not to forbid private discrimination—and thus to allow a “right to discriminate” only where the Constitution permitted—Article 34 incorporates the right to discriminate into the governmental machinery itself. It makes

75. Compare the Argument in Favor of Article 34, pp. 14-15 *supra*, with the following official Argument in Favor of Initiative Proposition No. 14 (*Proposed Amendments to Constitution, Propositions and Proposed Laws, Together With Arguments* (To Be Submitted to the Electors of the State of California at the General Election, Tuesday, Nov. 3, 1964) :

Your “Yes” vote on this constitutional amendment will guarantee the right of all home and apartment owners to choose buyers and renters of their property as they wish, without interference by State or local government
....

Your “Yes” vote will require the State to remain neutral: Neither to forbid nor to force a home or apartment owner to sell or rent to one particular person over another....

... It will restore to the home or apartment owner, whatever his skin color, religion, origin, or other characteristic, the right to sell or rent his property as he chooses. It will put this right into the California constitution, where it can be taken away only by consent of the people at the polls.

76. See p. 15 *supra*.

a governmental decision turn upon a popular plebiscite wherein race is plainly on the agenda.

We do not urge that all referenda in public housing matters would be invalid for this reason. Nor does our submission seek to have the Court review the mental processes of voters at particular referenda, to determine whether they voted for constitutionally forbidden reasons. Compare *Spaulding v. Blair*, 403 F.2d 862 (4th Cir. 1968); *Ranjel v. City of Lansing*, 417 F. 2d 321 (6th Cir. 1969); *Southern Alameda Spanish Speaking Organization v. City of Union City*, 424 F. 2d 291 (9th Cir. 1970). The very difficulty of that sort of subjective inquiry warns against allowance of selective and extraordinary referendum procedures that are calculated by their nature to promote unlitigable discriminations. The road that we ask the Court to follow in overturning such procedures is an old one. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); see, e.g., *Louisiana v. United States*, 380 U.S. 145 (1965); *Whitus v. Georgia*, 385 U.S. 545 (1967).

In each of these cases, statutes were invalidated not merely as applied, but also on their faces. They were unconstitutional not merely because they had in fact been misapplied but also because, in their setting, they were bound to be misapplied; because they inaugurated a licensing regime of "purely personal and arbitrary power" (*Yick Wo v. Hopkins*, *supra*, 118 U.S., at 370) in a racial context. This is true, also, of Article 34. Its selective and discriminatory imposition of a unique referendum requirement for low-income public housing—a requirement unexplained and unexplainable except as the authorization of a racial veto against residential integration — violates the Equal Protection Clause.⁷⁷

77. "For, the very idea that one man may be compelled to hold . . . the means of living, or any material right essential to the en-

Article 34 Is Invalid Under the Supremacy Clause Because It Is Inconsistent With the Procedural Scheme of the Federal Housing Act of 1937, Frustrates the Act's Purposes, and Burdens Its Operation

Laws enacted pursuant to powers delegated to the United States under the Constitution are the supreme law of the land, and state laws inconsistent therewith are invalid. United States Constitution, Art. VI, cl. 2; *McCulloch v. Maryland*, 4 Wheat. 316 (1819). This is true even where federal laws create optional programs that the States are free to take or leave: if a State elects to participate in any such program, it must comply with the federal law that defines the program's procedures and purposes. *King v. Smith*, 392 U.S. 309 (1968); *Thorpe v. Housing Authority*, 393 U.S. 268 (1969). Any attempt by a State to "defeat or handicap a valid national objective" is impermissible. *Nash v. Florida Industrial Commission*, 389 U.S. 235, 239 (1967). A state law cannot stand when it "either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties, for the performance of which they were created." *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896), cited with approval in *Nash v. Florida Industrial Commission*, *supra*, 389 U.S., at 240.

Article 34 violates these principles. It erects a serious impediment to the realization of paramount federal goals. It frustrates the congressionally declared policy of pro-

joymnt of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo v. Hopkins*, *supra*, 118 U.S., at 370. And the fundamental rights against arbitrary and discriminatory governmental action "may not be submitted to vote; they depend on the outcome of no elections." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

viding desperately needed housing for the poor. It undertakes to license access to the benefits of the federal housing program, and to do so in a form that encourages arbitrary and discriminatory exercise of the licensing power. It does these things by imposing a procedural requirement upon the administration of the federal program that adds to, and is inconsistent with, the procedures specifically and carefully detailed by Congress.⁷⁸ "The question is whether California may impose this restraint or control" *Public Utilities Commission of California v. United States*, 355 U.S. 534, 543 (1958). We submit that it may not, for several reasons.

First, Article 34 is inherently inconsistent with the federal procedural scheme. Congress has written into its housing program for the poor a careful description of federal-state interaction and cooperation—of federal financial participation and local governmental self-determination. While this mix of federal money and local governmental control is not unique,⁷⁹ its intended implementation is explicitly structured by procedures set forth in the Housing Act of 1937. "In recognition that there should be local determination of the need for low-rent housing to meet needs not being adequately met by private enterprise," 42 U.S.C. 1415(7), Congress required that there should be certain quite specific determinations made by the local governing body: first, to

78. At pp. 76-78 *infra* we will discuss provisions of appropriations legislation in 1952, 1953 and 1954 which assumed the existence of, but did not authorize, local referenda. Appellants admit that these provisions "are not now part of the Congressional enactment" (Brief for Appellant Shaffer, p. 53). We will show, in addition, that Congress never approved or prescribed any form of local referendum, but rather addressed itself to an existing phenomenon, and to the fiscal problems that it presented.

79. See, e.g., the Model Cities program, note 43 *supra*.

approve the application for a preliminary loan in order to initiate the project, 42 U.S.C. § 1415(7)(a)(i); second, to agree to provide the necessary cooperation before the federal government would finance the project fully; 42 U.S.C. § 1415(7)(b)(i). Under the federal act, the local Housing Authority must also be satisfied, and must satisfy HUD, concerning the need for the housing. 42 U.S.C. § 1415(7)(a)(ii).

Article 34 engrafts upon this articulated procedure the requirement of popular approval by referendum of each and every proposed low-rent housing project. This additional requirement results in a congressionally unintended veto of every project that loses at the polls. But that is not its only effect. It discourages even the planning of projects;⁸⁰ it is costly and time-consuming in *every* case; and it forces the poor to battle for the benefits of the federal program by a political campaign for which they are ill-suited.⁸¹ Surely, this kind of obstruction of the Housing Act of 1937 cannot stand under the Supremacy Clause.

But Article 34 is also inconsistent with the Act at a more fundamental level. It converts the national policy of "a decent home and a suitable living environment for every American family"⁸² into a matter of local charitable grace,⁸³ subject to local licensure in a form calculated to invite racial discrimination or mere arbitrary veto. Persons better situated, uncaring of the plight of the poor and prejudiced

80. See A. 31, 122-123, 130, 152.

81. See A. 23.

82. See note 48 *supra*.

83. See Brief for Appellants James *et al.*, pp. 17-18 "If the poor want the affluent to provide them with housing, it would seem only reasonable that they should expect and be willing to accept the 'burden' of receiving the willing consent of a simple majority of those persons who are expected to help pay...."

against minorities, may make a mockery of the equal and fair distribution of federal benefits. This is not what Congress intended. We repeat the vital federal objectives defined in the 1937 Act:

It is declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this chapter, to assist the several States and their political subdivisions to . . . remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income . . . (42 U.S.C. § 1401.)⁸⁴

These objectives are plainly subordinated, where they are not wholly flouted, by Article 34. We need not rely upon the view of the Article entertained by its most extreme supporters—for example, the *Sacramento Union* of November 4, 1950 (vol. 151, No. 75,213), p. 10 which urged its adoption “to call a halt, in California at least, on the government planning nonsense”—in order to point up that, at the least, Article 34 authorizes and invites local voters to abrogate the policies of the Act in favor of their own. These latter policies are not the ones whose accommodation with the federal program Congress assured by means of the “local determination” recognized under procedures specified in the Act itself (pp. 70-71 *supra*); they are not any set of legitimate, consistent, non-arbitrary local concerns (*see* pp. 45-62 *supra*); they can only be invidious. Yet the very function of Article 34 is to prefer them to the national housing policy.

The conflict between the purposes of the Housing Act and those of Article 34 is exemplified by this record. The appel-

84. *See* also 42 U.S.C. § 1441(a), note 48 *supra*, which recognizes as a national housing goal the realization as soon as feasible of a decent home and a suitable living environment for every American family.

lees, 41 persons of low income, are now living in overcrowded⁸⁵ vermin infested, substandard housing.⁸⁶ Because of the rents they are forced to pay, even for this sort of demeaning housing, they are deprived of other necessities.⁸⁷ Unavailability of decent low-cost housing has necessitated the tragic breaking up of families.⁸⁸ More than 2,779 families in San Mateo County and in the City of San Jose are in basically the same situation as the individual appellees, and share the waiting lists for low rent housing.⁸⁹ There are 1,000 families waiting for decent sanitary low-cost housing in Fresno;⁹⁰ and 2,862 on the Sacramento Housing Authority list.⁹¹ The lists would be longer if not for the excessively long delay in obtaining a determination of eligibility, and the hopelessness of going through that process when it is widely known that no housing is available.⁹²

Article 34 is the roadblock to providing the low-cost housing which is so desperately needed.⁹³ In 1968 a low-rent housing proposal submitted to the voters in San Jose, pursuant to Article 34, was defeated, A. 28-30; two similar proposals met defeat in San Mateo County, A. 114-121. In the opinion of the Director of the San Mateo County Housing Authority, any low-income public housing proposal would be overwhelmingly defeated at referendum, because the

85. A. 14, 17, 19, 104, 106, 108, 110.

86. A. 17, 19, 60, 67-68, 104, 108, 110.

87. A. 20, 105, 107.

88. A. 14, 19, 104, 107, 129-130.

89. A. 56, 122-124.

90. A. 21.

91. A. 23.

92. A. 110, 124; see A. 21; *Draft, The Housing Situation: 1969*, 42.

93. A. 21, 23, 31-33, 122-124, 126, 128, 130, 133, 135-136, 138, 141, 143-144, 153, 155.

predominant middle-and-upper income residents fear devaluation of their property and an influx of low-income and minority groups, A. 122. This view is shared by the Directors of the Housing Authorities in Fresno and Santa Clara Counties,⁹⁴ and by numerous residents of San Mateo and Santa Clara counties who have had long experience in the housing area.⁹⁵

The results of referenda across the State of California have significantly impeded the implementation of the federal low-income public housing program in the State. From 1951 through mid-1968, about half of the low income units proposed to the California voters were defeated (A. 34-37).⁹⁶ In 1963, the Governor's Advisory Commission on

94. A. 21-22, 31-32.

95. A. 126, 128, 130, 133, 135-136, 138, 141, 143-144, 153, 155.

96. Appellant Shaffer says that she questions whether this document, appended to plaintiffs' memorandum of law filed with the complaint in the *Valtierra* case, "is properly part of the record, but [she does] . . . not dispute its statistics." (Brief for Appellant Shaffer, p. 28, n. 14.) It is unsurprising that she does not dispute the statistics, since the document in question was reproduced from an appendix to a submission by the California Real Estate Association to the California Constitutional Revision Commission in support of the retention of Article 34. *California Real Estate Association, Retention of Provisions for Elector Approval of Public Housing—Article XXXIV—in the California Constitution* (Presented to the California Constitution Revision Commission, August 1968), Appendix 2. Its summary totals were relied upon in a Drafting Committee report, *California Constitution Revision Commission, Report of the Article XXXIV Committee* (December 1968), 8, 11, and so are judicially noticeable. As for the posture of the document in this record, it is true that there was no formal verification of it, as there should perhaps have been. However, the document related to matters of public and official record; it was on file in this action, as a part of plaintiffs' legal submission, from the date of filing of the complaint; all of the defendants below had ample opportunity to question or to controvert it; and they did not do so for the obvious reason (as appellant Shaffer admits) that the document was not controvertible.

Housing Problems recommended repeal of Article 34 because of its harmful effect on the low-cost housing program.⁹⁷ Six years later, the Association of San Francisco Bay Area Governments published an extensive report on housing which summarizes California's experience with the several federal programs:

California utilization of federal housing assistance indicates an under-utilization of socially oriented housing programs in the light of needs within the State. Programs focused on low- and moderate-income housing have not been used to the same degree as programs such as F.H.A. . . . which provide mortgage insurance for the middle- and upper-income consumers . . . This emphasis on middle-class values is also reflected by the fact that California leads the rest of the nation in neighborhood facilities projects, urban beautification, urban mass transportation . . . 701 planning assistance for small areas and open space land program approvals. *It is interesting that California falls behind primarily in program areas dealing with low-income families.*

The same cannot be said, unfortunately, for the additional statistics which appellant Shaffer seeks to interject into the appeal for the first time in this Court. (Brief for Appellant Shaffer, p. 29.) Those figures do not appear in any official HUD publication; the "document" which appellant Shaffer describes as "supplied by" the HUD regional office (*ibid.*) was prepared and sent by that office to appellant's counsel under date of "June 1970" at his request. When we wrote to the regional office for the same information, we received an updated version (dated August 3, 1970), which lists one 200-unit referendum lost in Fresno County, *May 13, 1969*, that is not on the earlier list sent to appellant's counsel. We do not know how or by whom these lists were compiled; obviously, the first was either incomplete or careless; there is no reason to think better of the second. In any event, the additional statistics are essentially insignificant; after they are taken into account, it remains true that about half of the public housing units proposed at referenda in California since 1951 have been defeated.

97. HOUSING IN CALIFORNIA, 65.

The significance of the under-utilization of socially-oriented programs is that low-income households in California have less opportunity for achieving decent housing through federal assistance than if their incomes were higher. (ASSOCIATION OF BAY AREA GOVERNMENTS, REGIONAL HOUSING STUDY (Supplemental Report RA-4, October 1969), 18-21; emphasis added. See also notes 39-41 supra.)

Article 34 has proved to be—as it was designed to be, and can function only to be—an obstructive barrier to low-income federally assisted housing. It thereby defeats and handicaps a valid national objective, *Nash v. Florida Industrial Commission, supra*, 389 U.S., at 239, and violates the Supremacy Clause.

In making this submission, we do not ignore those provisions of the Independent Office Appropriations Acts of 1952, 1953, and 1954 that are relied upon by appellant Shaffer to demonstrate congressional recognition of the “propriety and reasonableness” of Article 34. (Brief for Appellant Shaffer, p. 7.) The appropriations acts, however, show no such thing. They do not deal with the propriety or the permissibility of popular referenda in administration of the federal housing program. Rather, confronted with the fact that—whether by referenda or other state procedures—localities might subsequently abandon public housing projects that they had begun and contracted to complete with federal money,⁹⁸ Congress enacted pro-

98. A celebrated instance involved Los Angeles, where the city council retracted its agreement for local cooperation after the Federal government had entered into an Annual Contributions Contract with the local housing authority. Amidst litigation precipitated by that *contretemps*, an Article 34 referendum was held, and the low-income project proposal was defeated. (99 Cong. Rec. 3587 (House, April 22, 1953).) It appeared that the federal agency had continued to throw good money after bad throughout this enterprise (see note 100 *infra*), and Congress was understandably troubled.

cedures to resolve the ensuing fiscal and contractual entanglements.

An identical proviso was enacted for fiscal years 1952 and 1953, providing that the Federal government would not continue federal financing if a project was once rejected by public vote or by a local governing body,⁹⁹ unless the project was subsequently reapproved by the same mechanism that had disapproved it. The simple purpose is obvious: to keep federal money out of projects whose future was clouded. In 1954, a more elaborate provision of the same sort was made, which also dealt expressly with the question who should shoulder the financial losses of aborted projects. This provision, generally called the Phillips Amendment (which repealed and superseded the earlier two provisions, 36 COMP. GEN. 434 (1956)), essentially required the locality to repay the federal government for expenditures prior to the date of a clear local abandonment (by referendum or local governmental action); but, if the federal agency expended further sums after that date,¹⁰⁰ the locality was not responsible for them.¹⁰¹

99. Independent Offices Appropriations Acts of 1952 (65 Stat. 268, 277), and 1953 (66 Stat. 393, 403):

... *Provided further*, That the Public Housing Administration shall not, after the date of approval of this Act, authorize the construction of any projects initiated before or after March 1, 1949, in any locality in which such projects have been or may hereafter be rejected by the governing body of the locality or by public vote, unless such projects have been subsequently approved by the same procedure through which such rejection was expressed.

100. In the Los Angeles situation, mentioned in note 98 *supra*, this is exactly what occurred. 99 Cong. Rec. 3586 (House, April 22, 1953); 99 Cong. Rec. 3504 (House, April 21, 1953); see 99 Cong. Rec. 3587 (House, April 22, 1953).

101. First Independent Offices Appropriation Act of 1954 (67 Stat. 298, 306):

In each enactment, Congress was thus attempting only to reach a satisfactory fiscal resolution of the intractable situations in which federal housing projects, once begun, were halted by referenda or otherwise. Congress did "not approve, much less prescribe" the referendum procedure. *Shapiro v. Thompson*, 394 U.S. 618, 639 (1969). The Housing Act remained unchanged, and required local approval only by the governing body. 42 U.S.C. § 1415(7)(a), (b).¹⁰² Appellant Shaffer correctly admits that the provisos "are not now part of the Congressional enactment" (Brief for Appellant Shaffer, p. 53).¹⁰³

Provided further, That unless the governing body of the locality agrees to its completion, no housing shall be authorized by the Public Housing Administration, or, if under construction continue to be constructed, in any community where the people of that community, by their duly elected representatives, or by referendum, have indicated they do not want it, and such community shall negotiate with the Federal Government for the completion of such housing, or its abandonment, in whole or in part, and shall agree to repay to the Government the moneys expended prior to the vote or other formal action whereby the community rejected such housing project for any such projects not to be completed plus such amount as may be required to pay all costs and liquidate all obligations lawfully incurred by the local housing authority prior to such rejection in connection with any project not to be completed. . . .

102. Cf. the history of the Gwinn Amendment, 41 OP. ATT'Y GEN. 274 (1956).

103. Appellant is correct because the Phillips Amendment, which superseded and repealed the previous provisos, was not permanent legislation, and was not repeated after fiscal 1954. See former 42 U.S.C. § 1411a. This is clear from the legislative history, 99 Cong. Rec. 3586 (House, April 22, 1953), where it was explicitly stated to be "applicable for fiscal 1954," see *National Labor Relations Board v. Thompson Products*, 141 F.2d 794, 797 (9th Cir. 1944), and from the nonpermanency of its language. See *Minis v. United States*, 15 Pet. 423, 445-46 (1841); *Cella v. United States*, 208 F.2d 783 (7th Cir. 1953).

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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(Appendix Follows)

Appendix

The Housing Act of 1937, as amended.

42 U.S.C. § 1401

Section 1401. *Declaration of policy.*—It is declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this chapter to assist the several States and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in urban, rural nonfarm and Indian areas, that are injurious to the health, safety, and morals of the citizens of the Nation. In the development of low-rent housing it shall be the policy of the United States to make adequate provision for larger families and for families consisting of elderly persons. It is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program, including responsibility for the establishment of rents and eligibility requirements (subject to the approval of the Authority), with due consideration to accomplishing the objectives of this Act while effecting economies. (Sept. 1, 1937, c. 896, § 1, 50 Stat. 888; July 15, 1949, c. 338, Title III, § 307(a), 63 Stat. 429; Sept. 23, 1959, P. L. 86-372, Title V, § 501, 73 Stat. 679.)

42 U.S.C. § 1410

(h) *Exemption of projects from taxes*—Payments in lieu of taxes—*Contributions by local governments.*—Every contract made pursuant to this Act for annual contributions for any low-rent housing project initiated after March 1949, shall provide that no annual contributions by the Authority [Public Housing Administration] shall be made

available for such project unless such project (exclusive of any portion thereof which is not assisted by annual contributions under this Act) is exempt from all real and personal property taxes levied or imposed by the State, city, county, or other political subdivisions, but such contract shall require the public housing agency to make payments in lieu of taxes equal to 10 per centum of the annual shelter rents charged in such project or such lesser amount as (i) is prescribed by State law, or (ii) is agreed to by the local governing body in its agreement for local cooperation with the public housing agency required under subsection 15(7) (b)(i) of this Act [§ 1415(7)(b)(i) of this title], or (iii) is due to failure of a local public body or bodies other than the public housing agency to perform any obligation under such agreement: Provided, That, with respect to any such project which is not exempt from all real and personal property taxes levied or imposed by the State, city county, or other political subdivisions, such contract shall provide, in lieu of the requirement for tax exemption and payments in lieu of taxes, that no annual contributions by the Authority [Public Housing Administration] shall be made available for such project unless and until the State, city, county, or other political subdivisions in which such project is situated shall constitute, in the form of cash or tax remission, the amount by which the taxes paid with respect to the project exceed 10 per centum of the annual shelter rents charged in such project: Provided further, That, prior to execution of the contract for annual contributions the public housing agency shall, in the case of a tax-exempt project, notify the governing body of the locality of its estimate of the annual amount of such payments in lieu of taxes and of the amount of taxes which would be levied if the

property were privately owned, or, in the case where the project is taxed, its estimate of the annual amount of the local cash contribution, and shall thereafter include the actual amounts of such payments or contributions in its annual report. Contracts for annual contributions entered into prior to the effective date of the Housing Act of 1964 [Sept. 2, 1964] may be amended in accordance with the first sentence of this subsection.

42 U.S.C. § 1415(7)(a)(i)(ii)

(7)(b)(i)

(7) In recognition that there should be local determination of the need for low-rent housing to meet needs not being adequately met by private enterprise—

(a) The Authority [Public Housing Administration] shall not make any contract with a public housing agency for preliminary loans (all of which shall be repaid out of any moneys which become available to such agency for the development of the projects involved) for surveys and planning in respect to any low-rent housing projects initiated after March 1, 1949, (i) unless the governing body of the locality involved has by resolution approved the application of the public housing agency for such preliminary loan; and (ii) unless the public housing agency has demonstrated to the satisfaction of the Authority [Public Housing Administration] that there is a need for such low-rent housing which is not being met by private enterprise; and

(b) the Authority [Public Housing Administration] shall not make any contract for loans (other than preliminary loans) or for annual contributions pursuant to this Act with respect to any low-rent housing project initiated after March 1, 1949, (i) unless the governing body of the locality involved has entered into an agreement with the public housing agency providing for the local cooperation required

by the Authority [Public Housing Administration] pursuant to this Act....

California Housing Authorities Law

Cal. Health and Safety Code § 34200. *Title of chapter.* This chapter may be cited as the Housing Authorities Law. (Added Stats. 1951, c. 710, p. 1947, § 1.)

Cal. Health & Safety Code § 34201. *Legislative findings and declaration of policy.* It is hereby declared:

(a) That there exist in the State insanitary or unsafe dwelling accommodations and that persons of low income are forced to reside in such accommodations; that within the State there is a shortage of safe or sanitary dwelling accommodations available at rents which persons of low income can afford and that such persons are forced to occupy overcrowded and congested dwelling accommodations; that these conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals, and welfare of the residents of the State and impair economic values; that these conditions necessitate excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health and safety, fire and accident protection, and other public services and facilities.

(b) That these slum areas cannot be cleared, nor can the shortage of safe and sanitary dwellings for persons of low income be relieved, through the operation of private enterprise, and that the construction of housing projects for persons of low income would therefore not be competitive with private enterprise.

(c) That the clearance, replanning, and reconstruction of the areas in which insanitary or unsafe housing conditions exist and the providing of safe and sanitary dwelling

accommodations for persons of low income are public uses and purposes for which public money may be spent and private property acquired and are governmental functions of state concern; that it is in the public interest that work on such projects be commenced as soon as possible in order to relieve unemployment which now constitutes an emergency; and the necessity in the public interest for the provisions of this chapter is declared as a matter of legislative determination. (Added Stats. 1951, c. 710, p. 1947, § 1.)

Cal. Health and Safety Code § 34240. *Housing authority of county or city; transaction of business; resolution of governing body.* In each county and city there is a public body corporate and politic known as the housing authority of the county or city. The authority shall not transact any business or exercise its powers, unless, by resolution, the governing body of the county or city declares that there is need for an authority to function in it. (Added Stats. 1951, c. 710, p. 1950, § 1.)

Cal. Health and Safety Code § 34313. *Consultation with school district; approval of governing body of county or city.* Except where there existed on September 15, 1945, contracts for financial assistance between a housing authority and the Federal Government, no low-rent housing or slum-clearance project shall be developed, constructed, or owned by an authority after September 15, 1945, except after consultation with the school district in which the project is located, and until the governing body of the county or city in which it is proposed to develop, construct, or own the project, approves it by resolution. (Added Stats. 1951, c. 710, p. 1953, § 1.)

Cal. Health and Safety Code § 34353. *Liability on bonds; debt limitation.* Neither the commissioners of an authority nor any person executing the bonds are liable personally on

the bonds by reason of their issuance. The bonds and other obligations of an authority are not a debt of the city, county, State, or any of its political subdivisions and neither are they liable on the bonds, nor are the bonds or obligations payable out of any funds or properties other than those of the authority; and the bonds shall so state on their face. The bonds do not constitute an indebtedness within the meaning of any constitutional or statutory debt limitation. (Added Stats. 1951, c. 710, p. 1957, § 1.)

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IN THE
Supreme Court of the United States

October Term, 1970

No. 154

RONALD JAMES, *et al.*,

Appellants,

vs.

ANITA VALTIERRA, HOUSING AUTHORITY OF THE CITY
OF SAN JOSE, *et al.*,

Appellees.

No. 226

VIRGINIA C. SHAFFER,

Appellant,

vs.

ANITA VALTIERRA, HOUSING AUTHORITY OF THE CITY
OF SAN JOSE, *et al.*,

Appellees.

Appeals From the United States District Court for the

Northern District of California.

**BRIEF FOR APPELLEE HOUSING AUTHORITY
OF THE CITY OF SAN JOSE.**

Opinion Below.

The Opinion of the District Court is reported in 313 F. Supp. 1 (N.D. Cal. 1970) *sub. nom Valtierra v. Housing Authority of the City of San Jose, et al.*, and *Hayes v. Housing Authority of San Mateo*. The Opinion appears in the Appendix at pp. 168-179.¹

¹Reference to the Appendix hereafter appears as "A".

Jurisdiction.

Jurisdiction of this appeal is founded upon 28 U.S.C. § 1253, in that injunctive relief was sought and obtained from a three-judge district court, constituted pursuant to 28 U.S.C. § 2281 and § 2284, against the enforcement of Article XXXIV of the Constitution of the State of California on the ground that it violates the Constitution of the United States both on its face and as applied.

Question Presented.

Does Article XXXIV of the California Constitution violate the equal protection clause of the Fourteenth Amendment to the United States Constitution by subjecting a decision of a local legislative body approving low rent public housing projects designed to benefit the urban poor, who consist of a disproportionately high percentage of racial minorities, to a special hurdle in the form of an automatic referendum not required with respect to other acts by such bodies?

Constitutional Provisions Involved.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

“ . . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the Laws.”

Article XXXIV of the California Constitution provides in pertinent part:

“ . . . No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county,

as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

"For the purpose of this article the term 'low rent housing project' shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. For the purposes of this article only there shall be excluded from the term 'low rent housing project' any such project where there shall be in existence on the effective date hereof, a contract for financial assistance between any state public body and the Federal Government in respect to such project.

"For the purposes of this article only 'persons of low income' shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

"For the purposes of this article the term 'state public body' shall mean this State, or any city, city and county, county, district, authority, agency, or any other subdivision or public body of this State."

Statement of Facts.

This is a direct appeal from a final judgment and decree entered April 2, 1970, by a three judge district court granting plaintiffs'-appellee's motions for summary judgment, declaratory judgment and a permanent injunction. The court below ruled that Article XXXIV of the California Constitution violates the equal protection clause of the Fourteenth Amendment by subjecting only low rent public housing projects to a special automatic referendum. This case originated as two separate class actions, one filed on behalf of plaintiffs in the City of San Jose, the other on behalf of plaintiffs in San Mateo County, California. The cases were consolidated for all purposes by the court below.

The plaintiffs below are all persons of low income (as defined by Article XXXIV), have been found eligible for public housing, and placed on the waiting lists of their local housing authorities.³ A majority of the Hayes plaintiffs are black (A. 80-85) and a majority of the Valtierra plaintiffs have Spanish surnames (A. 1). They now live in overcrowded, rundown, substandard dwellings. For even this sort of unsafe, unsanitary and de-meaning housing, they are required to pay rents that are exorbitant in light of their income, with the result that they are deprived of other necessities, such as food and clothing. These persons have not been placed in low-rent units by the local housing authorities because no units are presently available (A. 31,123).

³At the time the complaints were filed there were over 2,000 families on the waiting list of the San Mateo County Housing Authority (A. 123) and 625 eligible families on the waiting list of the Housing Authority of the City of San Jose (A. 10). All the Valtierra appellees have been on the San Jose waiting list for more than one year. (A. 3).

Pursuant to Article XXXIV, a low-rent housing plan developed by the Housing Authority of the City of San Jose was submitted to the voters in November of 1968. This plan called for the development of up to 1,000 units to be dispersed among various areas of San Jose with each structure having not more than four dwelling units. That proposal failed (A. 29).

The principal method by which housing authorities can provide safe, sanitary and decent housing for these thousands of poor people lies in the development of public housing projects with federal funds under the United States Housing Act of 1937 (42 U.S.C. §§ 1401, *et seq.*). In order to implement the Housing Act of 1937, California enacted The Housing Authorities Law (California Health and Safety Code §§ 34200 *et seq.*). The California law included specific legislative findings that unsanitary and unsafe dwelling accommodations exist in areas of the State where persons of low income are found to reside; that there is a shortage of safe and sanitary dwelling accommodations available at rents which low income people can afford; and that such conditions constitute a menace to the health, safety, morals and welfare of the residents of the State.

The Housing Authorities Law also provides that a public corporate body, to be known as the housing authority, can be activated in each county and city. That authority cannot act unless the local governing body declares a need therefor. Resolutions were passed declaring the need for a Housing Authority on March 18, 1941 by the Board of Supervisors of San Mateo County (A. 111) and on January 16, 1966 by the San Jose City Council (A. 25).

Once a housing authority has been activated, a professional staff is hired to develop plans for participation in leasing and construction programs. For new construction, the housing authority develops an application for a preliminary loan from the Department of Housing and Urban Development (hereafter, "HUD"). The loan money is used to pay for an option on a site, the preparation of project plans, and other development expenses.

Federal law requires consent of the local governing body of the city or county before a preliminary loan application is sent to HUD. Thus, even before money to purchase an option on a site is granted, experts from the local governing body, the local housing authority and the federal government have reviewed the plans and have determined not only that the project is needed but also that it is well planned, feasible as to cost and size, and complies with a myriad of technical requirements.

When a project has been completely planned and approved, the housing authority issues federally guaranteed bonds for sale to the public. Such bonds are not a debt or liability of the state or municipality. With the proceeds of the sale of bonds, the housing authority repays the preliminary loan, purchases land and constructs the units. An annual contribution contract between the housing authority and HUD, by which the purchasers of bonds are repaid, and a contract between HUD and the city or county for payments in lieu of taxes (usually 10 percent of the rents) to meet the cost of municipal services are negotiated. *No local funds* are used; the development and construction costs are borne completely by the federal government and by the tenants of the housing units.

Article XXXIV interjects the automatic referendum requirement after need for the housing program has clearly been ascertained, but before any of the funding and any final engineering work have been done. Approval or disapproval of a proposed project by voters is obviously not based on their expertise in the housing field. The question presented to the voters is whether they want low rent public housing in the local jurisdiction. No other type of federally funded local project is subjected to the same automatic referendum requirement.

Summary of Argument.

I.

The Doctrine of *Hunter v. Erickson* Applies to This Case.

Article XXXIV of the California Constitution, like the Akron City Charter in *Hunter v. Erickson*, 393 U.S. 385(1969), singles out a particular type of action by the local legislative body — in this case, the authorizing of low rent public housing designed to benefit a particular group (urban poor consisting of a disproportionately high percentage of racial minorities) — and imposes a special obstacle, in the form of an automatic referendum, not put before any other group seeking similar action by the legislative body.

Appellants claim that Article XXXIV was adopted to "fill a gap in California in the referendum system." Article XXXIV does more than "fill the gap." City council resolutions on low rent public housing could, without violating equal protection, be subject to the general referendum provisions of the California Constitution. The vice of Article XXXIV is that it requires *only* low rent public housing projects to be submitted *automatically* to a mandatory referendum.

II.

Others Who Are Similarly Situated Are Not Subject to Article XXXIV.

Traditional equal protection analysis shows that Article XXXIV is unconstitutional. The test is whether the class to whom the legislation in question applies includes all who are similarly situated. Whether the similarly situated class in this case be defined narrowly or broadly, Article XXXIV fails to accord similar treatment to all its members.

The most appropriate similarly situated class in this case is substantially identical to the class defined in *Hunter*—all who seek to regulate the real estate market in their favor. Article XXXIV does not treat alike all who are in this class.

If the similarly situated class is limited to include only those with an interest in *public housing*, Article XXXIV treats *low rent* public housing differently because under California law “middle and normal market” public housing can be constructed without undergoing a mandatory automatic referendum.

If the class includes all who benefit from *federally funded* state or local projects, Article XXXIV treats similarly situated people dissimilarly by affecting only those who benefit from federally funded *low rent housing projects*.

If the class is defined as all who benefit from federal financial assistance to housing, Article XXXIV affects only those who would benefit from this particular type of housing.

Thus, however the similarly situated class is defined, Article XXXIV is discriminatory. Unless that discrimination can be justified, Article XXXIV must fall.

III.

Article XXXIV is Not Supported by Compelling State Interests.

The impact of Article XXXIV falls most heavily on racial minorities, and it expressly classifies on the basis of wealth. Both of these classifications are "Constitutionally suspect." In addition, decent housing is a fundamental interest of the poor. Each of these circumstances requires a showing of a compelling state interest.

The conclusion of the court below that Article XXXIV's "impact falls on the minority resulting in an impermissible burden which constitutes a substantial and invidious denial of equal protection" is amply supported by the record. The uncontroverted affidavits on the racial makeup of the local urban poor and the state and national studies cited in the record consistently document that urban poor who qualify for low rent public housing consist of a disproportionately high percentage of racial minorities.

Article XXXIV cannot be saved upon the ground that it does not expressly classify on the basis of race. This Court has said that it will look to the "ultimate effect" of the challenged provision. Because the impact of Article XXXIV falls most heavily on racial minorities, it is irrelevant whether it is expressed in terms of race.

Article XXXIV classifies on the basis of wealth by its express application to "persons or families who lack the amount of income which is necessary . . . to enable them to live in decent . . . dwellings." Even though cases in which this Court has applied the compelling state interest test because of a wealth classification also involved a fundamental interest of the poor, this Court has never stated that a fundamental interest is a prerequisite to the

compelling state interest test. However, if it is, the prerequisite has been met in this case because decent housing is a fundamental interest of the poor.

No compelling state or local interests justify an automatic referendum for low rent public housing projects. Article XXXIV is not, as appellants suggest, consistent with the policy underlying the California Constitutional provision requiring a vote before bonded indebtedness can be incurred for which the local property owners will be responsible. Unlike general obligation bonds, housing authority bonds are not a debt or liability of the municipality. No local funds are used. In addition, after the project is completed the local community receives payments in lieu of taxes to meet the cost of municipal services.

The long term environmental effects of public housing upon the community are not so unique or substantially different as to justify singling out this type of project for an automatic referendum. The housing projects of institutional design to which appellants refer are now prohibited by federal law. In addition, HUD guidelines recommend scattered site projects to prevent high concentration of low income tenants. Moreover, local governing bodies make many decisions, not subject to an automatic referendum, such as zoning, which have a greater impact on the environment than low rent public housing.

Finally, Article XXXIV is not only unsupported by local interests, but it is actually contrary to them.

ARGUMENT.

INTRODUCTION.

This brief makes three basic points:

1. The doctrine this Court expressed last term in *Hunter v. Erickson*, 393 U.S. 385 (1969), places Article XXXIV in violation of the equal protection clause by imposing a special obstacle of an automatic referendum before those who would benefit from low rent public housing—the ill-housed poor, consisting of a disproportionately high percentage of racial minorities.

2. Acts of a legislative body which benefit other classes of people similarly situated are not subject to such an automatic referendum.

3. Because Article XXXIV expressly classifies on the basis of wealth, involves a fundamental interest of the poor, and its burden falls most heavily on racial minorities, it must fall unless supported by compelling state interests. No such interests have been demonstrated.

I.

The Doctrine of *Hunter v. Erickson* Applies to This Case: The Automatic Referendum Provision Declared Unconstitutional in *Hunter* Is Identical to Article XXXIV.

This Court decided substantially the same issue presented by this case in *Hunter*. The facts of this case and *Hunter* are strikingly similar. In *Hunter*, an amendment added to the City Charter of Akron by the initiative process prohibited enactment of any open housing ordinance unless first approved by city-wide referendum. Ruling the amendment violative of the equal protection clause, this Court stated:

“ . . . [T]he state may no more disadvantage *any particular group* by making it more difficult to

enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." 393 U.S. at 393. (Emphasis added).

Article XXXIV of the California Constitution, like the Akron City Charter, singles out a specific decision of a legislative body — the authorization of low rent public housing designed to benefit a particular group — urban poor consisting of a disproportionately high percentage of racial minorities — and subjects that decision to a special obstacle. That special obstacle is identical to the obstacle present in *Hunter* — a mandatory automatic referendum applicable only to a specific decision of a legislative body. Thus, not only must the poor first obtain approval of a low rent public housing project from both the city council and the housing authority but they must also then wage a campaign to win voter approval.

This special referendum obstacle is particularly burdensome to beneficiaries of low rent housing legislation. As a class, the poor tend to be less educated and more lacking in political know-how than other groups. This Court recognized in *Hunter* that minority groups may be particularly disadvantaged by a referendum requirement:

"The majority need no protection against discrimination and if it did, a referendum might be bothersome but no more than that. Like the law requiring specification of candidates' race on the ballot, *Anderson v. Martin*, 375 U.S. 399 (1964), § 137 places special burdens on racial minorities within the governmental process. This is no more permissible than denying them the vote on an equal basis with others." 393 U.S. at 391.

Appellants argue that because a referendum involves the basic democratic process of voting, Article XXXIV cannot be invalidated on equal protection grounds. *Hunter* refutes this notion. It teaches that the voters may not retain for themselves an automatic mandatory vote on only certain decisions of a legislative body designed to benefit a particular class of people unless all such decisions which benefit each and every class of people are subject to the same requirement or unless there are compelling state interests which justify this discriminatory treatment:

"... [I]nsisting that a State may distribute legislative power as it desires and that the people may retain for themselves the power over certain subjects may generally be true, but these principles furnish no justification for a legislative structure which otherwise would violate the Fourteenth Amendment. Nor does the implementation of this change through popular referendum immunize it." 393 U.S. at 392.

The policy articulated in *Hunter* should be reaffirmed in this case. Article XXXIV purports to give a greater voice to the people, but actually imposes a special burden on a particular group.

Appellant Shaffer claims that in three recent cases the courts of appeal have upheld state referendum statutes "which came far closer than does Article XXXIV to violating the principles of *Hunter v. Erickson*" (Appellant Shaffer's Brief, p. 58.) This is simply not true. The three cases cited are *Spaulding v. Blair*, 403 F. 2d 862 (4th Cir. 1968); *Ranjel v. City of Lansing*, 417 F. 2d 321 (6th Cir. 1969), cert. denied, 397 U.S. 980 (1970); and *Southern Alameda Spanish Speaking Organization v. City of Union City, California*, 424 F.

2d 291 (9th Cir. 1970). These three cases involve a common issue which has no relevance to this case or to *Hunter*. The issue in each was whether the *regular* initiative and referendum provision of the state general law or of a city charter could be used to overturn a zoning ordinance passed by the city council where racial motivation was alleged. None of these cases involved a *special* legislative procedure which required a certain type of decision by a legislative body to be submitted automatically to a referendum vote.

Appellants also claim that Article XXXIV was added to the California Constitution to "fill a gap in California in the referendum system" (Appellant Shaffer's Brief, pp. 6, 34) and for this reason can be distinguished from *Hunter* (Appellant City Council's Brief, p. 19). This claimed gap allegedly occurred when the California Supreme Court decided in *Housing Authority v. Superior Court*, 35 Cal. 2d 550 (1950) that a resolution adopted by a city council approving low rent public housing was not subject to the general referendum procedure provided for in Article IV, Sections 23 and 25, of the California Constitution.³

Article XXXIV, however does much more than fill the gap. Instead of making city council resolutions

³Article IV, Section 23 of the California Constitution gives the referendum power to the electors to approve or reject statutes. If a petition, signed by 5 percent of the voters voting in the last gubernatorial election, is submitted within a specified period of time to the Secretary of State asking that the statute in question be submitted to the electors, it must be placed on the ballot of the next general election.

Article IV, Section 25 gives the initiative and referendum powers to the electors of the city or county under procedures to be provided by the Legislature. California Elections Code, §3711 requires a petition containing the signatures of 10 percent of the electors in order to have the ordinance voted on in the next general election.

approving low rent public housing projects subject to the general referendum procedure under the California Constitution⁴ (which would permit a referendum if a petition with the requisite numbers of signatures were filed), Article XXXIV requires all low rent public housing projects to be submitted automatically to a mandatory referendum vote without a petition. It is this unique automatic referendum requirement that makes Article XXXIV offensive to the equal protection clause.

II.

Others Who Are Similarly Situated Are Not Subject to The Automatic Referendum Imposed by Article XXXIV.

Even if this Court had never before considered the factual situation presented in *Hunter v. Erickson*, traditional equal protection analysis would show that Article XXXIV is unconstitutional. When legislation is challenged as violating the equal protection clause, the first question is whether the class to whom it applies includes

⁴Such resolutions could be made subject to the general referendum procedure by a constitutional amendment. Additionally the State Legislature is given the power to determine what local decisions shall be subject to the initiative and referendum process. See, e.g., California urban renewal legislation (California Health and Safety Code, §33101).

Appellant Shaffer states that "the court below was grossly misled in assuming that urban renewal was free of voter control" and that "the court below tacitly made an unsupported and erroneous assumption that no referendum process exists as to several aid programs adverted to by it." (Appellant Shaffer's Brief, p. 48-49.) This is a misstatement of the court's holding. The court below said: "... in California, state agencies may seek federal financial assistance without the burden of first submitting the proposal to a referendum for all projects except low income housing" (A-176-177). (Emphasis added). The court did not say that these projects are absolutely free of voter control, but only that they are not subject to the special automatic referendum requirement.

all who are similarly situated.⁴ *Skinner v. Oklahoma, ex rel. Williamson*, 316 U.S. 535 (1942). If others similarly situated are not included within the class reached by the legislation the court must then determine whether there is a rational basis or a compelling interest to justify such different treatment. *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 628 (1969). In this case, as will appear, Article XXXIV does not treat alike all who are similarly situated, the compelling state interest test is applicable, and Article XXXIV fails to meet that test.

Whether the similarly situated class in this case be defined narrowly or broadly, Article XXXIV fails to accord similar treatment to all members of the class. For example, even if the similarly situated class were defined to include only persons having an interest in public housing—the narrowest conceivable similarly situated class—the California statutory scheme would still be found not to treat all members of the class alike. Middle and normal income housing (but not low income housing) can be constructed by a public agency without a prior vote of the people, as will be shown.

A. Those Who Are Similarly Situated But Not Subject to the Automatic Referendum Are the Same as Those Described in *Hunter*.

The similarly situated class in *Hunter* was defined as all "those who sought to regulate real property transactions . . ." The Court concluded that certain members of that class—those who would benefit from open housing legislation — were treated differently from those

⁴Tussman & tenBroeck, "The Equal Protection of the Laws," 37 Calif. L. Rev. 341, 346 (1949).

who would "regulate real property transactions in the pursuit of other ends." As specific examples, the Court noted that Akron's automatic referendum system did not "affect tenants seeking more heat or better maintenance from landlords, nor those seeking rent control, urban renewal, public housing or new building codes." 393 U.S. at 391. (Emphasis added).

The similarly situated class in this case is substantially identical to the class defined by this Court in *Hunter*—all who seek to regulate the real estate market in their favor. The only difference is the interest of the people affected by the hurdle of an automatic referendum. Instead of burdening those who seek open housing legislation as in *Hunter*, Article XXXIV burdens those who seek to benefit from low rent public housing—poor families who consist of a disproportionately high percentage of racial minorities.

Appellants urge that the similarly situated class should be defined as all who would benefit from public housing and that, because all who are eligible for public housing—low income families—are treated alike, there is no denial of equal protection. To limit the similarly situated group to the narrow subject of the challenged legislation, as appellants urge, would strip the equal protection clause of its meaning. Adoption of appellants' approach would mean, for example, that all legislation designed to benefit the poor could constitutionally be subjected to an automatic referendum because all the poor would be treated alike—only the poor would be similarly situated. Under appellants' theory a constitutional amendment or a state statute could require a majority vote of the people before any welfare legislation would become effective.

If appellants' argument is sound, this Court should have limited the similarly situated class in *Hunter* to all who benefit from open housing legislation—racial minorities. The Court in *Hunter* quite properly reached a different conclusion. The policy adopted in *Hunter*—to define a class in terms of the general subject matter of the challenged legislation—should also be applied in this case.

B. Article XXXIV Treats Similarly Situated People Distinctly, Even If, as Appellants Urge, the Class is Limited to Those Who Would Benefit From All Types of Public Housing Constructed or Acquired by the State.

The appellants have asserted that California treats all kinds of public housing alike and that the only kind of housing a governmental agency in California can construct, other than housing to which Article XXXIV applies, is housing for state officials and university personnel (Appellant Shaffer's Brief, p. 44; Appellant City Council's Brief, p. 13). This assertion is in error.

Although it was stipulated that the only public housing currently *in existence* in California is low cost public housing, there was no stipulation that the latter is the only kind of public housing that *can be developed* in California.

Under present California law, a Renewal Area Agency can be formed by a local governing body to issue bonds for the purpose of developing urban housing, expressly including construction of "low income, middle income and normal market housing." (Normal market housing is defined as housing for persons other than those of low and middle income). California Health and Safety Code, §§ 33701, *et seq.* While certain approvals by landowners within the boundaries of the agency are

initially required, once those approvals are obtained, no further approvals are required to initiate a middle income and normal market housing program. However, such an agency would have to seek voter approval via the mandatory referendum required by Article XXXIV for proposed low income housing only.

In addition, California statutory law also authorizes public housing for agricultural laborers "without regard to whether such persons and families have low income." California Health and Safety Code, §36051. Here again, persons who benefit from publicly assisted housing can avoid the requirements of Article XXXIV *if, but only if, they are not poor.*

Thus, assuming *arguendo* that appellants' definition of the similarly situated class is sound, Article XXXIV violates the equal protection clause on its face by singling out for an automatic referendum vote only those public housing projects designed to benefit the poor.

C. Article XXXIV Treats Similarly Situated People If, as the Court Below Found, the Class is Defined as All Who Would Benefit From Federally Funded State or Local Projects.

The court below selected as the similarly situated class all who would benefit from other types of federally funded local projects. Hundreds of federally funded local projects are administered through the state or local communities. Low rent public housing is the *only* type of federally funded project in California requiring voter approval as a prerequisite to receiving federal aid.

Appellant Shaffer claims that the lower court held that either all or none of the federally funded local projects must be submitted to an automatic referendum requirement and that under no circumstances will dif-

ferent treatment be tolerated. (Appellant Shaffer's Brief, p. 54). This implication is wrong. The lower court, following the teaching of *Hunter v. Erickson*, 393 U.S. at 392, stated that in order to single out one type of legislation designed to benefit a particular class of people and subject that legislation to a special hurdle of requiring voter approval, there must be a showing of a compelling state interest to justify this different treatment (A. 176-177).

Moreover, the burden is on appellants to demonstrate that the interests of the local community in low rent public housing are so substantially different from all other types of federally funded local projects as to justify the automatic referendum requirement. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

D. Article XXXIV Treats Similarly Situated People Dissimilarly If the Class is Defined as All Who Benefit From Federal Financial Assistance to Housing.

Another arguable definition of the similarly situated class would include all who benefit from federal assistance to housing. Adopting this definition leaves unchanged the discriminatory impact of Article XXXIV.

Federal financial assistance to moderate income housing is made through insured mortgage programs administered by the Federal Housing Authority and the Veterans Administration, reduced interest rates for mortgages administered by Federal National Mortgage Association and federal loan guarantees for private bank loans and subsidies to sponsors of particular housing projects to assist them in getting private financing. 12 U.S.C. §(1)(d)(3). None of the beneficiaries of these federal assistance programs for housing is required to secure a referendum vote under California law. Article

XXXIV singles out *only* the beneficiaries of federally assisted low rent housing.

Thus, however the similarly situated class is defined, Article XXXIV is discriminatory and unless that discrimination can be justified Article XXXIV must fall.

III.

Article XXXIV Is Not Supported By Compelling State Interests.

A. There Must be a Compelling State Interest in Order to Uphold Article XXXIV.

Legislation challenged as violating the equal protection clause because it burdens or benefits a particular class of people requires determination of whether the classification is justified by a *legitimate* governmental interest. *Douglas v. California*, 372 U.S. 353 (1963). However, in certain instances, the challenged legislation will be upheld only if *in addition* there is a *compelling* state interest to support treating one class of people differently from others who are similarly situated.

The compelling state interest doctrine in turn will be invoked when the classification in question fits one or both of two characterizations. First, classifications which are "constitutionally suspect", *McLaughlin v. Florida*, 379 U.S. 184, 194 (1964), or "traditionally disfavored", *Harper v. Virginia Board of Elections*, 383 U. S. 663, 668 (1966), require a compelling state interest for their salvation. Classifications based on race or wealth are both "constitutionally suspect", *Hunter v. Erickson*, 393 U.S. 385 (1969); *Griffin v. Illinois*, 351 U.S. 12 (1956). Second, if the interests of the people who fit within this classification are "fundamental", the compelling state

interest test is applied regardless of the basis of the classification. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

Article XXXIV must pass the compelling state interest test under both standards. The impact of Article XXXIV falls most heavily on racial minorities; it expressly classifies on the basis of wealth. Both classifications are constitutionally suspect. In addition, Article XXXIV involves decent housing, which is a fundamental interest of the poor.

1. *The Impact of Article XXXIV Falls Most Heavily on Racial Minorities.*

The court below stated:

"Although Article XXXIV does not specifically require a referendum for low income projects which will be predominantly occupied by Negroes or other minority groups, the equal protection clause is violated if a 'special burden' is placed on those groups by the operation of the challenged provision, if 'the reality is that the law's impact falls on the minority.' *Hunter v. Erickson*, *supra*, at 391." (A. 174).

"... [T]he law's impact falls on the minority resulting in an impermissible burden which constitutes a substantial and invidious denial of equal protection." (A. 175).

This conclusion is amply supported by the record.*

*An uncontroverted affidavit of the senior planner for the Santa Clara County Planning Department stated that only 5 percent of all the housing units occupied by white non-Mexican-Americans were in dilapidated or deteriorated condition, while 23 percent of the housing units occupied by Mexican-Americans and 20 percent of the units occupied by non-whites were in dilapidated or deteriorated condition (A. 62.)

Appellant Shaffer presents two arguments in support of her contention that Article XXXIV does not discriminate against racial minorities: First, she disputes the factual findings of the District Court; and secondly she contends that because there is no express racial classification in Article XXXIV, it is valid. Appellant Shaffer's initial argument relies upon statistics outside the record to dispute the findings of the District Court that the impact of Article XXXIV falls most heavily on racial minorities. Even assuming the propriety of such reliance, these statistics cover only Santa Clara County; they ignore San Mateo County, state and national studies. Since a state constitutional amendment is under attack, the state-wide statistics were and are relevant to the court's determination. Reports and studies cited in the record consistently document that the urban poor consist of a disproportionately high percentage of racial minorities.⁷

Furthermore, Appellant Shaffer's presentation of these statistics is seriously misleading. The statistics cited are from the *Housing Study, Phase I—Public Housing For City of San Jose, California*, Kaiser Engineers of Oakland, California, Report No. 70-10-R, March, 1970 (hereafter "Kaiser Report") which appellant has used in conjunction with other affidavits in an attempt to show that the ratio of racial minorities to poor people in Santa Clara County is the same as the ratio of racial minorities to the overall population (Appellant Shaffer's Brief, p. 30). Isolated and selected statistics from different reports and affidavits have been combined to support appellant's position, but the conclusions reached by the reports and affidavits taken as a whole are ignored.

⁷See pp. 24-25, *infra*.

The Kaiser Report itself concluded that racial minorities comprise a disproportionately larger number of low income households (Kaiser Report, p. V-3). Courts have noted as a fact that low income urban families have a disproportionately high percentage of minority groups. In *Southern Alameda Spanish Speaking Organization v. City of Union City, California*, 424 F. 2d 291 (9th Cir. 1970), the court said:

"Given the recognized importance of equal opportunities in housing, it may well be, as a matter of law, that it is the responsibility of a city and its planning officials to see that the city's plan, as initiated or as it develops accommodates the needs of its low-income families, who usually—if not always—are members of minority groups." 424 F.2d at 296. (Emphasis added).

National studies on housing needs have consistently found that a disproportionate percentage of the urban poor who qualify for public housing is composed of racial minorities. A majority of the persons living in low rent public housing which has already been built are non-white. HUD Report, Statistical Abstract, 1968. Moreover, a government report cited in the record below estimated that the total non-white occupancy by individuals of public housing units was approximately three-fifths to two-thirds. *Building The American City*, Report of the National Commission on Urban Progress to the Congress and to the President of the United States, Government Printing Office, House Document 91-34, p. 114 (hereafter, "Douglas Report").³

³Because of the adverse effect on the development of public housing, the Douglas Report has recommended that states eliminate these cases requiring automatic submission of housing projects to popular referendum. Douglas Report, pp. 190-191.

If the economic status of minority groups in general is analyzed, the greater incidence of low income is clearly evident. In 1967, 41 percent of the nonwhite population was poor, compared with only 12 percent of the white population. Douglas Report, p. 45. Another housing study cited in the record below found that 30% of all urban poor persons are non-white and that 61% of all non-white households in standard Metropolitan Statistical Areas had incomes of \$4,000 or less, compared with 25% of the white housing. *More Than Shelter, Social Needs in Low and Moderate Income Housing*, Report of the National Commission on Urban Problems to the Congress and to the President of the United States, Government Printing Office, Research Report No. 8, p. 35 (1968).

Appellant Shaffer, in her second argument, would distinguish Article XXXIV from other cases involving racial classifications on the ground that there is no express racial classification in the challenged provision. No such requirement exists. Clever and manipulative legislative drafting which carefully avoids express racial classifications will nevertheless fail if, in fact, the law's impact falls most heavily on racial minorities. As early as 1886, a legislative provision, completely neutral on its face, was found to violate the equal protection clause because it was administered to discriminate against orientals. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). "... [T]hat which cannot be done by express statutory prohibition cannot be done by indirection." *Anderson v. Martin*, 375 U.S. 399, 404 (1964).

In *Reitman v. Mulkey*, 387 U.S. 369 (1967), this Court invalidated a California constitutional amendment designed to "constitutionalize" the right to dis-

criminate privately in the sale or lease of property by prohibiting open housing legislation. Although the amendment was carefully drafted in neutral terms and made no mention of race, the Court found that its impact fell most heavily on racial minorities. The Court said it would look to the "ultimate effect" of the challenged provision and not be restricted to its express terms. The "ultimate effect" of Article XXXIV has been to defeat a number of low-rent housing projects that would benefit low income families,⁹ a disproportionately high percentage of which are composed of racial minorities.

Appellant Shaffer has also attempted to distinguish *Hunter* on the same basis, arguing that the legislation in that case involved an express racial classification. *Hunter* gives no hint that the result would have been different absent an express reference to race. To the contrary, the Court indicated that the result would have been the same:

"... [A]lthough the law on its face treats Negro and white, Jew and gentile, in an identical manner, *the reality is that the law's impact falls on the minority.*" 393 U.S. at 391. (Emphasis added).

The policy enunciated in *Hunter* is clear: Legislation designed to benefit racial minorities cannot be subjected to the special obstacle of an automatic, mandatory referendum. If the impact of the automatic referendum falls most heavily on racial minorities, it is irrelevant whether the challenged legislative scheme itself is expressed in terms of race.

⁹From November, 1950 to June, 1968, 31,071 low-rent units were proposed on ballots across California. Of the propositions submitted, approval was denied for the construction of 14,997 units (A. 34-37).

2. *Article XXXIV Expressly Classifies on the Basis of Wealth.*

Independent of the racial classification of Article XXXIV, but equally requiring imposition of the compelling state interest test, Article XXXIV expressly classifies on the basis of wealth. Persons of low income are defined in Article XXXIV as:

“ . . . persons or families who lack the amount of income which is necessary . . . to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.”

Thus, poor families eligible for low rent public housing are expressly singled out and burdened by a unique automatic referendum requirement before remedial housing legislation can become effective. The equal protection clause prohibits treating the poor differently, absent the showing of a compelling state interest.¹⁰ In *Edwards v. California*, 314 U.S. 160 (1941), Mr. Justice Jackson in a concurring opinion stated:

¹⁰Appellants claim that “if the poor want the affluent to provide them with housing, . . . they should expect and be willing to accept the ‘burden’ of receiving the willing consent of a simple majority of those persons who are expected to help pay for the housing and its correlative needs.” (Appellant City Council’s Brief, p. 13.) Appellant Shaffer claims that “there may be a moral duty to provide housing for those economically disadvantaged, or it may be prudent to do so as a prophylactic against social upheaval. But the constitution imposes no command to do so, and therefore the constitution imposes no command as to how the State is go to about determining when and if it shall do so.” (Appellant Shaffer’s Brief, p. 45.) This position stated by both appellants is clearly antithetical to this Court’s interpretation of the equal protection clause. No claim has been made that local communities must construct low rent public housing. The court below held only that a state may not place special obstacles in the way of enactment of legislation authorizing the construction of low rent public housing just as this Court held in *Hunter* that special obstacles may not be placed in the way of passage of open housing legislation.

"... We should say now, and in no uncertain terms, that a man's mere property status, without more, cannot be used by a state to test, qualify or limit his rights as a citizen of the United States. 'Indigence' in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed or color." 314 U.S. at 184-185.

This Court has since consistently ruled that poverty is no basis for treating people differently. *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956). In *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), the provisions of the Virginia Constitution requiring payment of a poll tax as a voting qualification were held violative of the equal protection clause. The Court stated, "Lines drawn on the basis of *wealth or property*, like those of race (citation omitted), are traditionally disfavored." 383 U.S. at 668. (Emphasis added).¹¹

This doctrine was reaffirmed last year in *McDonald v. Board of Election Commissioners of Chicago*, 394

¹¹Although disagreeing with the majority's adoption of this proposition, dissenting members of the Court have recognized that a classification based on wealth required a showing of a compelling state interest:

"... The 'compelling interest' doctrine has two branches. The branch which requires that classifications based upon 'suspect' criteria be supported by a compelling interest apparently had its genesis in cases involving racial classification, which have at least since *Korematsu v. United States*, 323 U.S. 214, 216 (1944) been regarded as inherently 'suspect.' The criterion of 'wealth' apparently was added to the list of suspects as an alternative justification for the rationale in *Harper v. Virginia Bd. of Elections*, 383, U.S. 663, 668 (1966) in which Virginia's poll tax was struck down." "*Shapiro v. Thompson*, 394 U.S. at 658-659 (Harlan, J., dissenting).

U.S. 802 (1969). Although the classification in *McDonald* was ultimately held not based on wealth, the Court, in determining whether to apply the compelling state interest standard, noted that:

"[A] careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), two factors which would independently render a classification highly suspect and thereby demanding a more exacting judicial scrutiny." 394 U.S. at 807-809.

Appellee must candidly say that in the cases in which this Court has applied the compelling state interest test because the classification was based on wealth, a fundamental interest of the poor was also at stake. The Court, however, has never stated that such a fundamental interest is a prerequisite to the compelling state interest test. However, if it is, the prerequisite has been met in this case because decent housing is a fundamental interest of the poor.

3. *Housing Is a Fundamental Interest of the Poor.*

Although this Court has never had the opportunity to consider separately for purposes of equal protection analysis whether housing is a fundamental interest, it has in the past commented on the importance of housing. In *Block v. Hirsh*, 256 U.S. 135, 156 (1921), the Court said that "housing is a necessity of life." More recently the Court in *Shapiro v. Thompson*, 394 U.S. 618 (1969), stated that "the very means to subsist—food, shelter and other necessities of life . . ." is the matter at stake for the plaintiffs. 394 U.S. at 627. Just as adequate housing is necessary for an individual's development, substandard housing and discrimination in

housing are root causes of all the problems facing ghetto inhabitants. Studies have documented the relationship between inadequate housing and inability to learn, between poor housing and health, and between unsuitable housing and unsuitable emotional development.¹³

This Court has defined as fundamental other interests which are no more basic than poor peoples' need for decent housing. Interests which have been found fundamental are *inter alia*, the right to travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969); the right to vote, *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); the right to political allegiance, *Williams v. Rhodes*, 393 U.S. 23 (1968); the right to procreation, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); rights with respect to criminal procedure, *Griffin v. Illinois*, 351 U.S. 12 (1956); and education, *Brown v. Board of Education*, 347 U.S. 483 (1954). In each of these cases, because a fundamental interest of those who were included in the classification was involved, the compelling state interest test was applied.

Surely, therefore, the interest of the poor in securing "safe and sanitary housing without overcrowding" is also fundamental.

B. No Compelling State or Local Interests Justify an Automatic Referendum For Low Rent Public Housing Projects.

Appellants must demonstrate a compelling state interest in order to sustain the challenged legislation because the impact of Article XXXIV falls most heavily

¹³Comment, *Decent Housing As A Constitutional Right*, 42 U.S.C. §1893, *Poor People's Remedy for Deprivation*, 14 How. L.J. 338, 340 (1968); Comment, *Tenant Interest Representation; Proposal For A National Tenant's Association*, 47 Texas L. Rev. 1160, 1172-1173 (n. 61) (1969).

on racial minorities, expressly classifies on the basis of wealth and involves the fundamental interest of decent housing. Separate consideration of each interest asserted by appellants shows that they have failed to carry this burden.

1. *The Fiscal Interests Asserted by Appellants Are Not Substantial: They Are Less Significant Than the Fiscal Interests Underlying Other Types of Decisions of Legislative Bodies Not Subject to an Automatic Referendum Requirement.*

This Court has never held that an economic interest constitutes a compelling state interest.¹³ Moreover, the economic burden of low rent public housing on local communities is either insignificant or non-existent.

Appellant Shaffer suggests that Article XXXIV was approved by the voters to rectify decisions of the California Supreme Court which eroded the principles of sound fiscal control imposed upon cities, counties and school districts by the provisions of Article XIII, Section 40 of the California Constitution (previously Article XI, Section 18, renumbered without change on June 3, 1970), (Appellant Shaffer's Brief, p. 34). Article XIII, Section 40, however, relates to long term indebtedness for which property owners within the particular city, county or school district will be responsible. Hence, it is incongruous to argue in the circumstances here that Article XXXIV was enacted to "rectify the erosion"

¹³This Court recently held in *Shapiro v. Thompson*, 394 U.S. 618 (1969) that saving of state funds is an insufficient interest to support a classification of nonresident poor who otherwise qualify for welfare payments. "The saving of welfare costs cannot justify an otherwise invidious classification." 394 U.S. at 633.

The Court found in *Shapiro* that the administrative interests asserted by the State failed to meet the traditional rational relationship test, much less the required compelling State interest. 394 U.S. 638.

(Appellant Shaffer's Brief, p. 34) where property owners will not be responsible for long term indebtedness incurred by a housing authority.

Article XIII, Section 40, does impose the requirements of a referendum upon the incurring of certain types of debt. However, there are a substantial number of methods used in financing capital projects available to the agencies named in Article XIII, Section 40, which may well impose a financial burden upon property owners and other persons through property taxes and user charges or a combination thereof, but which will not be subject to the automatic referendum requirement. For example, charter cities may under appropriate circumstances, issue revenue bonds without a referendum as to whether such indebtedness should be incurred. See *City of Santa Monica v. Grubb* 245 Cal. App. 2d 718 (1965); cf. also, *Cipriano v. City of Houma*, 395 U.S. 701 (1969), which discusses upon whom the financial burden may fall. Financing of capital improvements by a sale-leaseback or a lease-leaseback method in which the lessee agency is obligated to make lease payments from year to year, which payments may be derived from general property tax levies, is not subject to an automatic referendum. cf. California Government Code, §§ 6500, *et seq.*; *Dean v. Kuchel*, 35 Cal. 2d 444 (1950); Rev. Rul. 63-20, 1963-1 C.B. 24. Additionally, capital projects may be financed through installment purchase contracts payable from revenues received from the facility acquired.

While as noted above, such financing methods are not subject to Article XIII, Section 40 of the California Constitution "because the words of the 1879 Constitu-

tion did not fit new or ingenious devices" (Appellant Shaffer's Brief, p. 34), the courts have recognized these new methods and approved them. In addition to those financing methods, California has countless special agencies and districts which are not subject to Article XIII, Section 40. Thus it is difficult to follow the argument that Article XXXIV was enacted as the means to regain the control lost by the voters under *Housing Authority v. Dockweiler*, 14 Cal. 2d 437, (1939).¹⁴ If no local indebtedness is incurred by a housing authority in the implementation of its program, whether or not that program is subject to automatic referendum, the proposed analogy of Article XIII, Section 40, is not apt.

The appellants claim that local districts have a significant financial commitment because they must agree to provide municipal services to the project and accept a percentage of the rental income in lieu of property taxes.¹⁵ These, however, are simply not the types of interests that are as a general rule subjected to a constitutionally mandated vote by residents of the community. Furthermore, judgments which have a much greater financial impact on the voters than the decision to build

¹⁴The California Supreme Court held in *Dockweiler* that housing authorities were not subject to the debt limitation of the California Constitution. The Court went on to state that even if it were assumed that housing authorities were subject to the debt limitation this type of debt would not constitute a debt within the meaning of the Constitution because its bonds are payable exclusively from the revenue generated by the project and by federal aid. 14 Cal. 2d at 460.

¹⁵Appellant Shaffer lists "streets, sewers, drain and lighting" as municipal services that are provided at City expense. (Appellant Shaffer's Brief, p. 35). This is not true. These public improvements are defined as being a part of the "project" and are paid for out of housing authority funds. California Health and Safety Code §34212.

100 percent federally funded low rent public housing are not subject to an automatic referendum. These include, *inter alia*, decisions to raise property taxes, to let long term contracts, to enter into financing arrangements with other agencies which involve incurring long term bonded indebtedness,¹⁰ to build new roads, streets and parks and countless other such day-to-day governmental decisions.

The local unit of government does not agree to provide the services covered by real and personal property taxes without charge, but instead agrees to provide these services in return for a negotiated amount, which is usually 10 percent of the rent received from the project. There is no evidence that this amount will be insufficient to cover the costs of providing public services to the project. Indeed, if the project is constructed in a slum clearance area, the local governing body may well collect more revenue from the 10 percent rental income that it had been collecting from taxes on the property prior to construction of the project. Furthermore, the costs of providing services such as fire and police protection and code enforcement may have been significantly higher in the slum area before construction of the project. Thus, the local community will be financially benefited rather than burdened by low rent public housing.

Property tax exemptions are not confined to public housing projects. The California Constitution and California Revenue and Taxation Code grant numerous exemptions from taxation without any requirement that

¹⁰See *Westbrook v. Mihaley*, 2 Cal. 3d 765, 791-792 (1970), in which the California Supreme Court discusses the various methods used in incurring long term bonded indebtedness without a vote requirement.

an organization whose property is exempt from taxation obtain voter approval before acquiring valuable nonexempt property.¹⁷

Tax exempt organizations in many instances are able to acquire valuable property, thereby removing it from local tax roles, without voter approval. Municipal services such as fire and police protection are still provided after this property becomes exempt from taxation. The revenue loss through these property tax exemptions is greater than the loss through public housing projects because there is no requirement for payments in lieu of property taxes as there is for public housing.

The fiscal interests asserted by appellants are so much less significant than other decisions made by local governing bodies that do not require a mandatory referendum that they cannot be considered reasonably related to the purpose of the referendum. Much less can they be considered a compelling state interest.

2. *The Long Term Environmental Effects of Public Housing Upon the Community Are Not so Unique or Substantially Different to Justify Singling Out This Type of Project for an Automatic Referendum.*

Appellants claim that housing projects "of institutional design and mammoth size" strongly influence the environment of a community and therefore justify this special vote requirement. (Appellant Shaffer's Brief, p. 36). This claim has no factual basis. The

¹⁷E.g., California Constitution, Article XIII, §§ 1-1/4 (b); California Revenue and Taxation Code, §§ 200-214. Exempt property includes *inter alia* property used for libraries, schools and museums (*id.*, § 202) property used exclusively for religious, hospital, scientific or charitable purposes (§ 214); the homes of disabled war veterans (§ 205.5); the property of colleges (§ 203); that of orphanages (§ 207) and the property of churches (§ 206).

public housing project defeated in San Jose was a proposal for small four unit residential structures to be dispersed throughout the city (A. 29). Federal law now prohibits the construction of "mammoth housing projects of institutional design."¹⁸ In addition, HUD guidelines recommend scattered site projects to prevent high concentration of low income tenants. Any proposal to locate housing only in areas of racial concentration will be *prima facie* unacceptable and will be returned to the local authority for further consideration.¹⁹

That such projects incompatible with the community have been built in slum clearance areas in the past and have "perpetuated rather than overcome racial segregation" is a direct result of refusals to accept the type of public housing proposed in San Jose and now required by HUD guidelines. The Douglas Report documented the fact most forcefully:

"The general tendency in recent years on the part of too many public housing authorities has been to emphasis high-rise and large-scale

¹⁸42 U.S.C. § 1415(11).

¹⁹Low Rent Housing Pre-Construction Handbook, R.H.A. 7410.1 Chapt. 1, Section 1a—Nondiscrimination in Housing (June, 1970). See also Local Public Agency Letter #318, Supplements 2 and 3 of Feb. 21, 1968, as reported in 3 OCH Urban Affairs Rptr. ¶ 17,560, setting as a prerequisite for federal financial assistance for public planning an indication of how the proposed projects meet the goal of reducing residential concentration of minority groups within the community.

A federal court has recently blocked proposals to locate projects in racially concentrated areas and ordered low rise, scattered site projects in white neighborhoods. Judgment Order, *Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill. 1969).

In *Hicks v. Weaver*, 302 F. Supp. 619 (E.D. La. 1969), the court granted a preliminary injunction against construction of a housing project in an already racially concentrated area.

apartment projects. *This trend has been caused by many factors, notably the refusal of the dweller in the suburbs and in the outer and middle-class sections of the cities to accept public housing. This, in turn, has driven public housing closer to the center of the cities where land costs are high. The high cost of land and the continued immigration of low income families have then led public housing authorities to construct high rise buildings in order to get so many housing units as possible on each acre of land. . . . Suburbanites and middle-class residents who criticized the huge projects in the Central city and who, at the same time, opposed any project in their neighborhoods, should realize that their refusal to permit the diffusion of public housing is a major factor in creating the concentration they deplore.*" Douglas Report p. 123. (Emphasis added).

Local governing bodies make many decisions that have a greater environmental impact on the local communities without an automatic referendum. For example, zoning legislation has a much greater impact on the environment because zoning determines whether a community is to be low density residential, high density residential, commercial or industrial. Because of the tax consequences the financial implications of zoning are also very significant. Other examples which impose comparable consequences are city planning and urban renewal.

Appellants cannot assert that the local community has a compelling interest in subjecting low rent public housing projects to an automatic referendum requirement when it does not place the same requirement on other projects or laws which have as much or greater impact on the community's environment.

3. *Article XXXIV Is Contrary to the Interests of Local Communities.*

Instead of supporting local interests, as appellants claim, Article XXXIV works against the overall interests of the local communities.

Local communities have a strong interest in eradicating blighted areas. One of the most effective ways to expedite slum clearance is to relocate families living in overcrowded, unsanitary housing to low rent public housing units disseminated throughout the district.

The history of Article XXXIV is replete with instances in which the local governing bodies and housing authorities have determined, after careful evaluation of studies on the housing needs of the community, that there is a need for low rent public housing, only to have their considered judgment reversed. As a consequence, the slum areas remain and poor families continue to live in the overcrowded unsanitary housing with all its debilitating effects. Because of Article XXXIV, the interests of the local community considered as a whole become secondary to the interests of a majority living in middle class areas. Article XXXIV is a vehicle used by this majority to keep the poor and racial minorities in the slums.

Conclusion.

For the foregoing reasons it is respectfully submitted that the judgment below holding Article XXXIV of the California Constitution violative of the equal protection clause of the Fourteenth Amendment should be affirmed.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1970

No. 154

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Appellants,

—v.—

ANITA VALTIERRA, *et al.*,

Appellees.

No. 226

VIRGINIA C. SHAFFER,

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**MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*
AND BRIEF *AMICI CURIAE* OF THE NAACP LEGAL
DEFENSE AND EDUCATIONAL FUND, INC., AND THE
NATIONAL OFFICE FOR THE RIGHTS OF
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IN THE
Supreme Court of the United States
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No. 154

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VIRGINIA C. SHAFFER,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

**MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*
AND STATEMENT OF INTEREST OF THE *AMICI***

Movants NAACP Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent respectfully move the Court for permission to file the attached brief *amici curiae*, for the following reasons. The reasons assigned also disclose the interest of the *amici*.

(1) Movant NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional

rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Negroes suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. The charter was approved by a New York court, authorizing the organization to serve as a legal aid society. The NAACP Legal Defense and Educational Fund, Inc. (LDF), is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts, in cases involving many facets of the law.

(2) A central purpose of the Fund is the legal eradication of practices in our society that bear with discriminatory harshness upon Negroes and upon the poor, deprived, and friendless, who too often are Negroes. In order more effectively to achieve this purpose, the LDF in 1965 established as a separate corporation movant National Office for the Rights of the Indigent (NORI). This organization, whose income is provided initially by a grant from the Ford Foundation, has among its objectives the provision of legal representation to the poor in individual cases and the presentation to appellate courts of arguments for changes and developments in legal doctrine which unjustly affect the poor. Thus NORI is engaging in legal research and litigation (by providing counsel for parties, as *amicus curiae*, or co-counsel with legal aid organizations) in cases in which rules of law may be established or interpreted to provide greater protection for the indigent.

(3) In carrying out this program to establish the legal rights of Negroes and of the poor, LDF and NORI attorneys have handled numerous cases involving public and private housing, particularly ones challenging the denial of housing opportunities to those groups as a result of both

private and public discriminatory conduct. E.g., *Thorpe v. Housing Authority*, 386 U.S. 670 (public housing); *Williams v. Schaffer*, 385 U.S. 1037 (summary eviction of indigent tenant); *Triangle Improvement Council v. Ritchie*, — F.2d — (4th Cir. No. 14033, May 14, 1970, *reh. denied*, July 14, 1970) *pet. for cert. pending*, O.T. 1970, No. 712 (displacement of poor blacks by federally assisted highway); *Ranjel v. City of Lansing*, 417 F.2d 321 (6th Cir. 1969), *cert. denied*, 25 L.Ed.2d 390 (referendum denying zoning change to permit low cost housing); *Arrington v. City of Fairfield*, 414 F.2d 687 (5th Cir. 1969) (displacement of poor blacks by publicly aided construction); *Kennedy Park Homes Association v. City of Lackawanna*, — F. Supp. — (W.D.N.Y. August 13, 1970), appeal pending, No. 35320, 2d Cir. (refusal by city to permit development of low cost, black owned subdivision); *Western Addition Community Organization v. Weaver*, 294 F. Supp. 433 (N.D. Cal. 1968) (Urban renewal).

(4) It has become increasingly clear in recent years, if it was not so before, that the denial of opportunities for decent housing to the poor and particularly to members of minority groups is a major contributing factor to social unrest, see REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (KERNER COMMISSION) 266-274; 467-482 (Bantam Ed. 1968), and that it has a multiplier effect in restricting the availability of educational, employment and other opportunities. It is likewise manifest that the private sector of the economy is unable to meet the needs of the poor for housing, and that the public sector has woefully failed to meet even the goals set in legislation. 42 U.S.C. §§1401, 1441; 12 U.S.C. §1701(t); BUILDING THE AMERICAN CITY, REPORT OF THE NATIONAL COMMISSION ON URBAN PROBLEMS (DOUGLAS COMMISSION), *passim*. Part of the reason for this failure is found in local requirements, such as the provision of the California Constitution chal-

lenged in this case, which set up barriers to the construction of low cost housing. Perhaps reflecting "the self-righteous opposition often expressed toward subsidized housing for the poor," *id.* at 66, these requirements place burdens on the efforts of the poor to obtain decent housing which do not exist for those who are able to afford the cost of private housing. Article 34 of the California Constitution is particularly onerous, and has contributed to the fact that California has a much lower per capita availability of public housing than other comparable states.

(5) The *amici* believe that the attached brief will assist the Court by placing the California provision at issue here in a national perspective. We submit that it helps demonstrate that restrictions such as this have a racially discriminatory effect, which works to undo much of what this Court and the Congress have done to guarantee equal rights and equal opportunity.

(6) The individual appellees and the appellee Housing Authority of San Jose have consented to the filing of this brief *amici curiae*. This motion is filed because counsel for each of the appellants has refused consent.

WHEREFORE, movants pray that the attached brief *amici curiae* be permitted to be filed with the Court.

Respectfully submitted,

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**BRIEF *AMICI CURIAE* OF THE NAACP LEGAL
DEFENSE AND EDUCATIONAL FUND, INC.,
AND THE NATIONAL OFFICE FOR THE
RIGHTS OF THE INDIGENT**

Statement

This action challenges the validity, under federal constitutional standards, of Article 34 of the Constitution of

the State of California.¹ That provision requires that before any low rent housing project can be built in any municipality, the project must be approved by the voters of the "city, town or county" at a general or special election, specifically defining "low rent housing project" as one "financed in whole or in part" by federal or state subsidies, and further defining "persons of low income," those to be served by such projects, as those who, as determined by public housing authority standards, "lack the amount of income which is necessary . . . to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding." It became a part of the state constitution in 1950, as a result of a state-wide referendum, purportedly in response to the decision of the California Supreme Court in *Housing Authority v. Superior Court*, 35 Cal.2d 550, 219 P.2d 457 (1950), which held that decisions by a local housing authority to build public low-rent housing were administrative and not legislative decisions, and thus not subject to review by subsequent referendum, as, for example, would be an enactment by a city council.²

Two separate actions were filed in the district court—one by residents of the city of San Jose against the housing authority³ and city council of that city,⁴ as well as the

¹ The full text of Article 34 appears at pp. 2-4 of the brief of appellant Shaffer in No. 226, and at pp. 7-9 of the brief of appellants James, et al., in No. 154.

² As discussed in Part I of the argument, *infra*, Article 34 overshoots the possible need of filling the referendum gap created by that decision, in that it *requires* a *prior* referendum, rather than simply *authorizing* a *subsequent* one.

³ The Housing Authority of San Jose has not appealed and appears in this Court as an appellee. It has filed a brief in support of the individual appellees, challenging the validity of Article 34.

⁴ The Mayor and all but one member of the City Council of San Jose appear as appellants in No. 154. One member of the Council, Virginia C. Shaffer, is separately represented, and is the appellant in No. 226.

United States Department of Housing and Urban Development,⁵ and one by residents of San Mateo County against the housing authority of that County.⁶ The two cases were consolidated for all purposes by the district court, and are therefore joined in this appeal. The plaintiff-appellees are all poor persons who live in deteriorated housing in the two municipalities, and with few exceptions, they have been certified by the respective housing authorities as eligible for public housing. As a result of the shortage of public housing, which they contend is in large measure a result of the operation of Article 34,⁷ they have not been placed in such housing.⁸

Ruling on motions for summary judgment filed by the plaintiffs in both actions, the three-judge district court held that Article 34 is invalid as a denial of equal protection, in that it constitutes an impermissible classification on the basis of wealth and further that, since the "low-income projects . . . will be predominantly occupied by Negroes or other minority groups" (App. p. 174), "the law's impact falls on minorities" (App. p. 175), creating a classification on the basis of race. *Valtierra v. Housing Authority of the City of San Jose*, 313 F. Supp. 1 (N.D. Cal. 1970) (App. pp. 168-179). This appeal, under 28 U.S.C. §1253, followed.

⁵ The federal defendants were dismissed on their motion by the district court. App. pp. 171-2. That action is not questioned in this appeal.

⁶ The San Mateo defendants chose to stand mute in the district court and do not appear in this appeal.

⁷ In both areas, recent public housing proposals have been defeated in the referenda required by Article 34. App. pp. 28-29 (San Jose); App. pp. 118-121 (San Mateo).

⁸ The affidavits of the plaintiffs, describing their present circumstance and their efforts to obtain public or other decent housing appear at App. pp. 14-20 (San Jose) and App. pp. 104-110 (San Mateo).

Summary of Argument

I

A. Article 34 on its face creates a classification on the basis of wealth. It requires the approval of the voters in a prior referendum before any subsidized housing for "persons of low income" can be built, but creates no such barrier to the housing needs of persons whose income enables them to purchase housing in the private market. Moreover, no other provision of California law imposes a similar obstacle on other than persons of low income, although various types of financial assistance are provided to assist the more affluent to obtain housing.

Article 34 serves no legitimate state interest. Assuming, *arguendo*, that the residents of a municipality have an interest in reviewing decisions which affect the development of their community, this interest could be satisfied by providing for *subsequent* referendum review of decisions to build public housing, initiated, when desired, by the opponents of the project, rather than *prior* referendum approval, which must be initiated in every case by its proponents. This would place public housing on a par with, for example, zoning changes which may benefit private housing for the wealthy, and which is subject to such review. Similarly, the state policy in favor of referenda and local democracy would be satisfied by providing for the possibility of subsequent review by the voters of public housing decisions.

The state policy requiring prior approval of legislative decisions which incur major long-term indebtedness is not relevant to public housing, as substantially all of the capital costs are met by federal subsidies. Article 34 also results in an impermissible distinction between federally subsidized public housing which benefits the poor and

housing assistance provided to the more wealthy, as well as other public projects which receive substantial federal assistance, such as highways, and which are not burdened even with the availability of subsequent popular review.

B. Even if there were some legitimate state interest served by Article 34, it is not a "compelling state interest" such as is required to justify a classification on the basis of wealth. This Court has held that "lines drawn on the basis of wealth or property . . . are traditionally disfavored." *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 668 (1966). Where such classifications are found, a higher standard of justification is required than where typical, non-discriminatory state economic regulations are involved. Housing is a matter of vital importance to all and particularly to those who lack the income to obtain it in the private market. A burden placed on the availability of decent housing to the poor results in the deprivation of other fundamental rights, and thus has an effect beyond its immediate impact. No "compelling state interest" supports the burden on the poor which Article 34 creates.

II

A. While Article 34 on its face creates a classification only on the basis of wealth, it is well established that courts may look beyond to the actual effect of a challenged provision to determine its ultimate effect. The fact that an enactment is racially neutral does not bar a determination that its impact falls on minorities. The history of Article 34 strongly suggests a racially discriminatory motivation for its enactment. However, even in the absence of such motivation, the effect remains a relevant area of inquiry.

The record in this case demonstrates, and the opinion below, in harmony with decisions in similar cases, holds

that an enactment which discriminates against the poor has an inordinate impact on racial minorities, in this context, blacks and Mexican-Americans, because of the strong correlation between minority group status and poverty.

B. The racially discriminatory effect of Article 34 reinforces other discriminatory devices and serves to perpetuate segregation. It is particularly severe, because the denial of housing opportunities effectively restricts minority group members from access to other opportunities. Article 34 is an example of numerous public and private devices which promote discrimination in housing. The referendum procedure, highly desirable in most circumstances in a democracy, has frequently been misused for such purposes. In areas other than housing, subtle, facially neutral devices have been used commonly to discriminate against racial minorities, but have been invalidated by the courts. A like analysis applied to this case will reveal, as it did to the lower court, that Article 34 is discriminatory.

C. Since it has an inordinate impact on racial minorities, Article 34 is inherently suspect, and must overcome an extremely heavy burden of justification. No such showing exists here, for the reasons discussed in Part I, *supra*. Additionally, the fact that Article 34 was originally adopted by a state-wide majority vote and requires in its operation a decision by a local majority is irrelevant to its validity, since the majority may not act to limit the constitutional rights of minorities. Article 34 denies to racial minorities equal protection of the laws.

III

The direct effect of Article 34 of placing a special burden on the access of the poor to decent housing, and the incidental effect, resulting from the correlation between race and poverty, of restricting the availability of housing to racial minorities has a combined result of denying to many Negro Americans in California access to housing equal to that of whites. This result constitutes, as to them, the imposition of a badge or incident of slavery, prohibited by the Thirteenth Amendment, and constitutes a violation of the mandate of 42 U.S.C. § 1982, as interpreted by this Court in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

ARGUMENT

I.

Article 34 Enshrines in California's Constitution a Discrimination Based on Poverty In Violation of the Equal Protection Clause of the Fourteenth Amendment.

Article 34 establishes a formidable obstacle to the construction of federally aided public housing within the means of poor people, in the absence of any analogous provision with respect to other housing or to other federally aided public benefit programs. In so doing Article 34 operates arbitrarily, irrationally, and invidiously to deny poor people the equal protection of the laws.

A. Article 34 Is Repugnant to the Equal Protection Clause Because It Imposes a Special Burden on the Poor That Is Not Rationally Related to Any Legitimate Governmental Objective.

According to its own terms, Article 34 applies exclusively to low rent housing projects. It defines a low rent housing project as "any development composed of urban or rural dwellings, apartments, or other living accommodations *for persons of low income*", Calif. Const. Art. 34 §1 (emphasis added). By further definition, these are persons who "lack the amount of income which is necessary . . . to enable them, without financial assistance, to live in decent, safe, and sanitary dwellings, without overcrowding." *Ibid.* This language is explicit: it singles out for special governmental treatment only such housing as would benefit persons unable to provide adequate housing for themselves without public assistance.

On its face Article 34 openly differentiates between the poor and all other people. The impact of a restrictive classification falls on those who would benefit from the

programs hampered, cf. *Hunter v. Erickson*, 393 U.S. 385, 391 (1969). In this case low income persons stand primarily to benefit. Wealthy persons need little or no assistance in finding housing. Cf. *Hunter v. Erickson*, *supra* at 391, where this Court noted, "the majority needs no protection against discrimination." As appellant Shaffer somewhat misleadingly notes, "Directing legislation as to the problem of poverty is not classification on the basis of poverty." Brief of Appellant Shaffer in No. 226 at 44. But Article 34 is not a legislative enactment to deal with "the problem of poverty." It erects a barrier against legislative programs that provide for the housing needs of the poor.

The fact that California has, with limited exceptions, not yet chosen to provide public assistance for any housing other than low income housing⁹ is irrelevant. California

⁹ Even this analysis ignores the participation of Californians in federally-financed programs to assist moderate-income housing in the form of private homes, such as the Federal Housing Administration (FHA), Veteran's Administration (VA), and Federal National Mortgage Association (FNMA) programs.

Such programs have been of major importance in increasing the housing supply available to moderate and upper income groups. See, e.g., *BUILDING THE AMERICAN CITY, REPORT OF THE NATIONAL COMMISSION ON URBAN PROBLEMS (THE DOUGLAS COMMISSION)*, at 66 (1968):

The Nation has made a phenomenal record over the last two decades in building housing for the middle and affluent classes . . . Government policy has provided significant incentives and help through mortgage guarantees, secondary credit facilities, and Federal income tax deductions for interest payments and local property taxes. . . .

The extent to which Government policy has subsidized the private homeowner is not generally recognized or acknowledged. . . . This generous but generally unacknowledged Federal subsidy to the affluent or middle-class homeowner needs to be emphasized in view of the self-righteous opposition often expressed toward subsidized housing for the poor. . . .

In contrast to its truly amazing record in housing construction for the upper half of America's income groups, the Nation has made an inexcusably inadequate record in building

could legislatively decide to provide such assistance, without encountering any constitutional restrictions on its actions like those encumbering low income housing. The discrimination lies in the establishment of two different legislative processes: one, more arduous, for measures that would particularly benefit a disfavored minority group; and the other, more routine, for measures of benefit to the majority. Cf. *Hunter v. Erickson*, *supra* at 390; Black, *The Supreme Court 1966 Term, Foreward: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, 75-76 (1967). Article 34 offends precisely because it singles out the poor with the effect and for the apparent purpose of reducing the already limited housing opportunities available to them. Article 34 lends the weight of constitutional restriction to all the other forces and handicaps that the poor must contend with in their efforts to achieve the minimum of human dignity.

We submit that the District Court below properly held Article 34 an "unequal imposition of burdens upon groups that are not rationally differentiable in light of any legitimate state legislative objective." Appendix, p. 173. An examination of the interests and objectives asserted by appellants should lead this Court to agree that the discrimination embodied in Article 34 is not rationally related to any of these interests.

Appellants contend in justification of Article 34 that it merely reasserts California's strong policy in favor of referenda and local democracy. This contention distorts

or upgrading housing for the poor to provide them with decent, standard housing at rents they can afford. [footnote omitted.]

Moderate and upper-income Californians participate in these programs on a vast scale. See REPORT ON HOUSING IN CALIFORNIA, Governor's Advisory Commission on Housing in California (1963), especially the Appendix. *California has imposed no legislative restrictions of any kind on participation in these federal programs.*

both the substance of California's referendum policy and the nature of Article 34, as a brief description of the Article's history will indicate. California's general constitutional reservation of referendum powers to the people secures the popular option "to so adopt or reject any Act, or section or part of any Act, passed by the Legislature," and extends to local review of local legislative actions. Calif. Const. Art. 4 § 1. Nothing in this language requires or permits the imposition of a *prior* referendum requirement. It simply reserves to the people the power to approve, alter, or amend legislative actions already taken.

With particular reference to local bond issues, appellants also assert that California policy requires prior approval of any local action incurring indebtedness, Brief of Appellant Shaffer in No. 226 at 33-34. This constitutional policy is allegedly embodied in Calif. Const Art 11 § 18, providing that no locality shall incur indebtedness or liability in excess of its annual revenue without voter approval Yet as the extensive discussion of Art 11 § 18 in *Westbrook v. Mihaly*, 2 Cal. 3d 765, 471 P.2d 487 (1970) indicates, this restriction is meant to apply only to actions requiring the locality itself to make expenditures and assume bonded debt.¹⁰ It should not apply to programs under the Federal Housing Acts of 1937 and 1949, because there the federal agency guarantees and assumes the costs of housing

¹⁰ Section 18 establishes "pay as you go" as "a cardinal rule of municipal finance," applicable to "projects necessitating long-term expenditures," *Westbrook v. Mihaly*, *supra* at 776-77, 471 P. 2d at 494. One case interpreting the purpose of the section found that it was to avoid a situation "whereby the holders of an issue of bonds could . . . force an unconsented-to increase in the taxes of, or foreclosure on the general assets and property of the issuing public corporation." *City of Redondo Beach v. Taxpayers, Property Owners, etc., City of Redondo Beach*, 54 Cal. 2d 126, 131, 325 P. 2d 170 (1960); *Westbrook v. Mihaly*, *supra* at 777 n. 16, 471 P. 2d at 494 n. 16.

development.¹¹ Under these programs the municipality is merely an intermediary between the funding agency and the bondholders. The programs involve no current expenditures or affirmative financial obligations for the municipality. They are in effect federal and state projects administered locally.

For this reason, the California Supreme Court in *Housing Authority v. Superior Court*, 35 Cal. 2d 550, 219 P.2d 457 (1950) held that such local housing authorities' acts were "executive and administrative" rather than "legislative," and therefore not subject to the referendum provisions of the California Constitution. *Id.* at 461, 462. Article 34 was enacted shortly after this decision, evidently in response to it. Appellant Shaffer now contends that Article 34 does no more than close the "loophole" left by the *Housing Authority* decision, Brief of Appellant Shaffer in No. 226 at 18, 33-34. This argument is unpersuasive on two grounds. First, there was in fact no "loophole," since as shown above the Art. 11 §18 prior referendum requirement was never intended to apply to this situation. Article 34 was in fact a substantially new enactment. Second, even if any loophole had existed, Article 34 does much more than "close the loophole" left by the decision. The *Housing Authority* case could have been overruled, had that been the sole object, by an amendment permitting subsequent referendum review of decisions to build low rent housing. But Article 34 went beyond such overruling of the decision to impose an additional requirement Cf. *Reitman v. Mulkey*, 387 U.S. 369, 376-377 (1967); Black, *The Supreme Court 1966 Term, Foreward: "State Action,"*

¹¹ The Federal government guarantees all such bonds issued and reimburses the local authority for payments on principal and interest. 42 U.S.C. §1409. There can thus be no possibility of impairment of the municipality's fiscal integrity by these bonds.

Equal Protection, and California's Proposition 14, supra, at 77. Article 34 requires the so called full measure of "local democracy" only for approval of the projects which affect the housing aspirations of the poor. Whereas a subsequent referendum requirement might arguably bring decisions to build public low rent housing into procedural conformity with all other legislative programs, the prior referendum requirement singles out programs which benefit the poor. Such a classification on grounds of poverty is irrational because poverty is unrelated to the objective of democracy, *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), and therefore violates the Equal Protection Clause, *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966); *Skinner v. Oklahoma*, 316 U.S. 535, 542 (1942); *Carrington v. Rash*, 380 U.S. 89, 96 (1965).

Even if low cost housing projects did involve local expenditures (and therefore arguably fall within the scope of the California policy favoring prior referenda on long-term fiscal undertakings), Article 34 would be offensive to equal protection principles. Only low income housing is subject to its requirement. No similar burden is placed on other state legislative actions assisted by federal funds even where such projects, like low income housing, take property off local tax rolls.¹² As the Court below stated,

The vice in this case is that Article XXXIV makes it more difficult for state agencies acting on behalf of the poor and the minorities to get federal assistance

¹² Appellant Shaffer professes not to see the "likeness in any rational aspect" between such projects and low-income housing. Brief of Appellant Shaffer in No. 226 at 46. Yet, to take but one example, federally-funded highway construction under the Federal-Aid Highway Act of 1956, as Amended, 23 U.S.C. §§101 et seq., also takes large tracts of local land off tax rolls and may impose heavy future obligations on the municipality by encouraging new residential, industrial, and commercial developments requiring utility improvements and municipal services.

for housing than for state agencies acting on behalf of other groups to receive financial federal assistance. . . . Some common examples, *inter alia*, are: highways, urban renewal, hospitals, colleges and universities, secondary schools, law enforcement assistance, and model cities. (Appendix p. 177.)

It is irrational and impermissible to limit the application of the policy to low income housing, while all other projects which might involve similar local fiscal obligations are not so disfavored. A valid classification must be reasonable in light of its purpose, *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). This classification is eminently unreasonable and hence repugnant to the Equal Protection Clause.

The analogy between housing projects and the other federally assisted projects just mentioned also serves to discredit the "non-fiscal" justifications of the prior referendum requirement. These purported justifications are "sociological," "psychological," and aesthetic, see Brief of Appellant Shaffer in No. 226 at 19, 36-38. Yet highways, schools and renewal projects, like low income housing, involve displacement and relocation, affect housing patterns, and have substantial social consequences for the locality.¹³ Nevertheless these programs are not equally subject to prior referendum approval. It would appear that the principal support for Article 34 derives less from concern for the sociological aspects of urban development, than from unwillingness to allow low rent housing residents into the locality.

We do not here contend that *any* referendum provisions, as for example the possibility of subsequent popular dis-

¹³ Cf. *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F. 2d 920 (2nd Cir. 1968); *Triangle Improvement Council v. Ritchie*, — F. 2d — (4th Cir. No. 14033, May 14, 1970, reh. denied July 14, 1970), *pet. for cert. pending*, O.T. 1970 No. 712.

approval, is necessarily invalid. We do not attack "democracy" but only the discriminatory application of the referendum requirement. We submit that the poverty-based discrimination of Article 34 must be struck down as an arbitrary and invidious classification lacking any rational relationship to legitimate governmental ends. *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Harper v. Virginia State Board of Elections*, *supra*; *Griffin v. Illinois*, 351 U.S. 12 (1956).

B. Even If There May Be Some Rational Justification For Article 34, This Justification Does Not Rise to the Level of a Compelling State Interest in the Measure. Absent Such an Interest, Article 34 Is Constitutionally Defective Under the Equal Protection Clause.

Even if there were some rational relationship between Article 34's classification and a proper governmental goal, the Article would still violate the Equal Protection Clause. It certainly does not further any "compelling" or "overriding" state interest. Only such an interest should justify official wealth-based discriminations.

As this Court has held, "Lines drawn on the basis of wealth or property, like those of race [citation], are traditionally disfavored," *Harper v. Virginia State Board of Elections*, *supra*, at 668; *McDonald v. Board of Elections*, 394 U.S. 802 (1969). Consequently, this Court has in many instances involving wealth-related classifications declined to adhere to the equal protection standard traditionally applied in review of state economic or social regulations, *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61 (1911); *McGowan v. Maryland*, 366 U.S. 420 (1961). It should not apply any such traditional standard here.

When the discrimination cuts against the welfare of the poor, a more demanding standard comes into play, par-

ticularly when an important interest is thereby jeopardized. Thus, this Court in *Harper v. Virginia State Board of Elections*, *supra*, stated that "where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined," 383 U.S. at 670. See also *Shapiro v. Thompson*, *supra*, at 633, 638; cf. *Williams v. Rhodes*, 393 U.S. 23, 32 (1968). Judicial review in such cases requires that the State demonstrate a "compelling interest" in its scheme, for mere rationality or some conceivable justification will not suffice to offset the important interest of the individuals adversely affected by the classification. *Shapiro v. Thompson*, *supra*, at 638.

For example, in *Southern Alameda Spanish Speaking Organization v. City of Union City*, 424 F.2d 291 (9th Cir. 1970), the court found that the effect of a municipal zoning referendum was "to deny decent housing and an integrated environment to low income residents," 424 F.2d at 295. Observing that the municipality "may well" have an affirmative duty to deal with the housing needs of the poor, the court stated:

Surely, if the environmental benefits of land use planning are to be enjoyed by a city and the quality of life of its residents is accordingly to be improved, the poor cannot be excluded from enjoyment of the benefits. Given the recognized importance of equal opportunities in housing, it may well be, as a matter of law, that it is the responsibility of a city and its planning officials to see that the city's plan as initiated or as it develops accommodates the needs of its low income families, who usually—if not always—are members of minority groups. 424 F.2d at 295-296. [footnotes omitted]

The court applied a much more rigorous standard of scrutiny than the traditional standard urged by appellants.¹⁴

Appellants' assertion that the case of *Dandridge v. Williams*, 397 U.S. 471 (1970) requires another standard is not well taken. That case fell squarely within the arena of economic measures as to which this Court has always allowed the states great latitude. *Dandridge* dealt with a state public welfare assistance program, and in particular with the "difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients," 397 U.S. 471, 25 L. Ed. 2d 491, 503 (1970). Here, the provision challenged does not significantly assist the state in regulating its finances. Article 34 restricts the development of housing that would not impose obligatory expenditures on the state or its subdivisions, but would be substantially financed by the federal government.¹⁵

Housing is a fundamental interest which must be protected from discriminatory state action not firmly grounded on a compelling state interest. This Court has long shown concern for the problems confronting those who are handicapped in their search for decent housing. *Buchanan v. Warley*, 245 U.S. 60 (1917); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Reitman v. Mulkey*, *supra*; *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Hunter v. Erickson*, *supra*.¹⁶ As a result of discriminatory practices and laws

¹⁴ Cf. *In re Appeal of Girsh*, — Pa. —, 263 A.2d 395 (1970), holding that a municipal zoning ordinance which made no provision for multiple-dwellings within the town was unconstitutional as it had the effect of totally excluding those who, for economic or other reasons, would prefer to live in apartments.

¹⁵ See pp. 11-12, *supra*.

¹⁶ Discriminatory deprivation of housing has also in recent years been the subject matter of a substantial and increasing volume of litigation before the lower federal courts. See, for example, *Nor-*

like Article 34, the housing crisis affects the poor as a group, as it also affects racial minorities.¹⁷

Congress has over a period of years repeatedly declared its concern for the inability of the poor to find adequate housing. The Housing Act of 1949 states:

"The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require . . . governmental assistance . . . to provide adequate housing for urban and rural non-farm families with incomes so low that they are not being decently housed in new or existing housing." 42 U.S.C. §1441.

In the Housing and Urban Development Act of 1968 Congress affirms the goal of §1441 but then finds "that this goal has not been fully realized for many of the Nation's lower income families; that this is a matter of grave national concern," 12 U.S.C. §1701(t). And by 42 U.S.C. §1401, first enacted in 1937, "It is declared to be the policy of the United States . . . to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income."

walk CORE v. Norwalk Redevelopment Agency, 395 F. 2d 920 (2nd Cir., 1968); *Southern Alameda Spanish Speaking Organization v. City of Union City*, 424 F. 2d 291 (9th Cir. 1970); *Ranjel v. City of Lansing*, 417 F. 2d 321 (6th Cir. 1969), *cert den.*, 397 U.S. 980 (1970); *Arrington v. City of Fairfield*, 414 F. 2d 687 (5th Cir. 1969); *Powelton Civic Home Owners Assn. v. HUD*, 284 F. Supp. 808 (E.D. Pa. 1968); *Kennedy Park Homes Assn. v. City of Lackawanna*, — F. Supp. — (W.D.N.Y. Aug. 13, 1970) (expedited appeal pending, No. 35320, 2nd Cir.); *Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill. 1969); *Otey v. Common Council of Milwaukee*, 281 F. Supp. 264 (E.D. Wisc. 1968); *Holmes v. Leadbetter*, 294 F. Supp. 991 (E.D. Mich. 1968); *Western Addition Community Organization v. Weaver*, 294 F. Supp. 433 (N.D. Cal. 1968).

¹⁷ The relationship of racial discrimination is more fully discussed in parts II and III of this Argument, *infra*.

Adequate housing within the means of poor people is also the key to enjoyment of other fundamental rights. The restriction of public housing programs, particularly when private low rent housing is disappearing through destruction, (often by governmental action¹⁸) and increasing costs,¹⁹ excludes low income persons from local electoral participation, cf. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), and reduces the right to travel and to locate oneself freely, *Edwards v. California*, 314 U.S. 160 (1941), *Shapiro v. Thompson*, *supra*, to a limited right of passage. Freedom of "in-migration," including immediate availability of welfare support for indigents, is constitutionally protected, *Shapiro v. Thompson*, *supra*, at 631, but this freedom is hollow indeed where discriminatory local regulations effectively prevent indigents from finding housing in areas to which they wish to migrate. Access to equal educational opportunities, *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), depends significantly on residence.²⁰ Access to housing is also essential to equal job opportunities for low income workers, particularly as the pattern of job dispersal into newer areas continues, if they are not to be prevented from following their jobs and freely competing for new ones. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (KERNER COMMISSION) 392-393 (Bantam Ed. 1968). If the poor are denied housing in the very

¹⁸ "Furthermore, over the last decades, Government action through urban renewal, highway programs, demolitions on public housing sites, code enforcement, and other programs has destroyed more housing for the poor than government at all levels has built for them." BUILDING THE AMERICAN CITY, *supra*, at 67.

¹⁹ See, e.g., Affidavit of Franklin Miles Lockfeld, App. pp. 59, 60-61.

²⁰ The discriminatory determination of educational opportunity by socio-economic patterns was a basis for detailed comment and a ground for the decision in *Hobson v. Hansen*, 269 F. Supp. 401, 513 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F. 2d 175 (D.C. Cir. 1969).

areas of most vigorous economic and demographic growth, such as Santa Clara and San Mateo Counties, they will remain excluded from the benefits of economic growth.

The State's justification for its discrimination between low rent housing and all other housing projects, therefore, must reflect a "compelling state interest," *Shapiro v. Thompson, supra* at 634, 638. Where "less drastic means are available" to assure the governmental objective, "it is unreasonable to accomplish this objective by the blunderbuss method." *Id.* at 637. As discussed *supra*²¹ the State's interest in Article 34 fails even to satisfy criteria of rationality or plausibility. California could have carried out its policy favoring referenda without placing a special burden on the poor, by *permitting* low income housing projects to be submitted to *subsequent* referendum. Instead California chose to encumber low income housing with the special onerous requirement of *prior* referendum approval. As against the vital constitutional interest in protecting the poor minority against injury from unequal treatment with regard to its most important interests, the State's alleged justifications for Article 34 merit no greater deference than was accorded to them by the Court below. The District Court's summary dismissal of these justifications was proper, and its holding that Article 34 violates the Equal Protection clause was correct.

²¹ Pp. 10-14.

II.

Article 34 Establishes an Official Racial Classification Which Is Arbitrary, Invidious, Discriminatory, and Violative of the Equal Protection Clause of the Fourteenth Amendment.

Article 34 effectively classifies people on a racial basis for different governmental treatment, even though the words of the Article are not explicitly racial. This violates the right of the racial minority to the equal protection of the laws.

A. *The Scheme of Article 34 Sets up an Official Classification Which Unequally Affects Different Racial Groups.*

The case at bar closely resembles *Hunter v. Erickson*, 393 U.S. 385 (1969), in which this Court invalidated an amendment to the Akron, Ohio, City Charter requiring prior referendum approval for any local legislative action relating to discrimination in housing. The present case is indistinguishable from *Hunter* but for the fact that by its terms, the discrimination is based on wealth rather than on race, religion, or ancestry. However, the racially discriminatory effect of Article 34 can be clearly demonstrated by examining its impact.

This Court in *Hunter* expressly looked behind the Charter amendment's terms to weigh its inevitable effect:

... although the law on its face treats Negro and white, Jew and gentile, in an identical manner, *the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination* and if it did, a referendum might be bothersome but no more than that. . . . §137 places special burdens

on racial minorities within the governmental process.
393 U.S. at 391. (emphasis added)

The court below relied on the quoted passage in finding that "here, as in the *Hunter* case, the impact of the law falls upon minorities." Appendix pp. 175, 176. Article 34, like the *Hunter* measure, is neutral on its face with regard to race. But here as in the previous case it is principally one group—the racial minority—which actually feels the burden of the measure. *Hunter* commands the invalidation of an enactment which has racially discriminatory effects, without requiring a showing of discriminatory motivation for the enactment. We submit that this Court should affirm the District Court's proper application of that recently announced constitutional mandate.

Neither this Court nor California itself is a stranger to attempts to cloak discriminatory legislation in superficially neutral terms. In *Reitman v. Mulkey*, 387 U.S. 369 (1967), this Court found both discriminatory purpose and effect, and held the state constitution's guarantee of the freedom to sell property invalid as a substantial state involvement in private discrimination. 387 U.S. at 378. The message of *Reitman* is clear: superficially non-discriminatory statutory language will be disregarded where the full facts indicate that the statute visits hardship on a racial minority. Cf. *Yick Wo v. Hopkins*, 118 U.S. 357, 374 (1886).

As a California constitutional amendment adopted by initiative and limiting equal housing opportunities, Proposition 10—the electoral version of Article 34—strongly resembles Proposition 14, the measure invalidated by this Court in *Reitman*. The arguments advanced by official proponents of Proposition 14 sounded themes of "the right to sell or rent [the owner's] property as he chooses", assured by means of a measure that "will require the state to stay neutral," and urged the electorate to "vote for free-

dom.”²² The California court characterized such arguments as an invitation to racial discrimination thinly disguised “by the ingenuity of those who would seek to conceal it by subtleties and claims of neutrality,” *Mulkey v. Reitman*, 50 Cal. Rptr. 881, 890, 413 P.2d 825 (1966). The official arguments in favor of Proposition 10 are strikingly similar. That measure’s advocates advanced it as “neither for nor against public housing,” but as a means to “restore to the citizens . . . the right to decide whether public housing is needed or wanted,” and invoked the mantle of “the democratic process of government.” Appendix at 50, 51, 52. Here as in the case of Proposition 14, this Court should look beyond the proponents’ professed concern for “self-determination.” The benefits of the alleged “self-determination” and “democratic process” embodied in Article 34 are available only to the majority, at the expense of a racial minority oppressed thereby.

The inference of discriminatory motivation is not, however, essential to showing that Article 34 sets up an unconstitutional scheme. As the Court below properly held, “Certainly, *Hunter* does not demand a showing of improper motivation.” Appendix p. 177. Once Article 34’s discriminatory effect is exposed, *Hunter* clearly controls and Article 34 must fall on equal protection grounds. Since measures designed to benefit the poor are of substantial and particular importance to racial minorities, obstacles to the construction of low-income housing particularly affect these minorities. As a consequence Article 34 detrimentally affects blacks and Mexican-Americans far more severely than whites.

²² *Proposed Amendments to Constitution, Propositions and Proposed Laws, Together With Arguments*. (To be submitted to the Electors of the State of California at the General Election Tuesday, November 3, 1964.)

Article 34 by its terms discriminates on the basis of wealth. The court below found the evidence of the correlation between poverty and race so convincing that it entered summary judgment in part on the ground that wealth-based discrimination amounted to racial discrimination.²³

Beyond the existence of the race-poverty correlation in Santa Clara and San Mateo Counties lies the pattern, widely noticed in recent years, of a similar correlation across the nation. The National Commission on Urban

²³ The District Court noted in its Opinion:

"That minority groups comprise 'the poor' is increasingly clear. In his affidavit, Mr. Franklin Lockfeld, Senior Planner for the Santa Clara County Planning Department stated: 'The low-income areas are closely related to the areas of concentration of minority residents and high income areas are closely related to the nearly all white sections of the community. . . . In 1960, only 5% of the units occupied by white-non-Mexican-Americans were in dilapidated or deteriorated condition, while 23% of the units occupied by Mexican-Americans and 20% of the units occupied by non-whites were in dilapidated or deteriorated condition. Minorities were thus over represented in the less than standard housing by greater than four to one, and occupied nearly one-third of the deteriorating and dilapidated housing in the County in 1960.'" App. p. 176 n. 2.

See also Affidavit of Dovie Ruth Wylie, Planner with the San Mateo County Planning Commission, expressing the informed opinion that there is a strong relationship between minority racial status and poverty in San Mateo County. App. p. 147-148. This view was uncontradicted below.

And see Declaration of Attorney Andrew H. Field, President of Fair Housing Council in San Mateo County: "... discrimination in housing in San Mateo County on the basis of race and ethnic background prevails throughout the housing industry. . . . The major method by which laws against open discrimination are evaded is by making most housing in San Mateo County economically beyond the means of most members of racial minority groups." App. p. 132-133.

Problems (Douglas Commission) summarized the situation in blunt terms:

Most important, poverty families in substandard housing have a high correlation with race. If you are *poor* and *nonwhite* and *rent*, the chances are three out of four that you live in substandard housing. BUILDING THE AMERICAN CITY, Report of the National Commission on Urban Problems (1968), p. 10.²⁴

Other studies have also concluded that the poor tend to be members of a racial minority, and vice versa. The National Advisory Commission on Civil Disorders (Kerner Commission) traced the same statistical correlations. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (Bantam Ed. 1968), p. 258. Federal courts have frequently taken note of this correlation.²⁵ In light of the wide recognition conferred upon the race-poverty correspondence, it would appear undeniable that measures

²⁴ The Commission also notes, "... the incidence of poverty is much higher among non-whites than among whites. In 1967, 41 per cent of the non-white population was poor, compared with 12% of the white population. Nonwhites thus constitute a far larger share of the poverty population (31%) than of the American population as a whole (12%). Moreover, the nonwhite proportion of the poverty population has been increasing, slowly but steadily." *Id.* p. 45.

²⁵ See, e.g., *Southern Alameda Spanish Speaking Organization v. City of Union City*, 424 F. 2d 291, 296: "... low-income families, who usually—if not always—are members of minority groups."

Hobson v. Hansen, 269 F. Supp. 401, *aff'd sub nom. Smuck v. Hobson*, 408 F. 2d 175: "... for a majority of District schools and school children race and economics are intertwined: when one talks of poverty or low income levels one inevitably talks mostly about the Negro." 269 F. Supp. at 454.

Ranjel v. City of Lansing, 293 F. Supp. 301 (W.D. Mich. 1968), *rev'd on other grounds*, 417 F. 2d 231 (6th Cir. 1969), found "a strong relationship between race and poverty," 293 F. Supp. at 303.

burdensome to the poor cut with special cruelty at blacks, Mexican-Americans, and other minorities. Article 34 is such a measure. We submit that the findings of the District Court, which was particularly familiar with these localities, of a racially discriminatory effect, were wholly proper.

B. The Unequal Burden of Article 34 Is But One Aspect of a Pervasive Pattern of Racial Discrimination. This Pattern Perpetuates Residential Segregation and Discriminatorily Denies to Minorities a Wide Range of Opportunities.

The racial effects of Article 34 with respect to low rent housing cannot be adequately considered apart from the broader patterns of racial discrimination in housing throughout California and across the nation. Article 34 is yet another example of the numerous ways in which blacks, Mexican-Americans, and other minority groups are denied equal opportunities in housing. Considered in this light, each discriminatory device (whether by design or otherwise) contributes significantly to the advancing evil which this lawsuit seeks in small part to redress: a society presently segregated and becoming ever more so.²⁶ More specifically, the effect of each discriminatory device for blacks and other minorities is to limit their mobility, to restrict their employment, educational and recreational opportunities, and to increase the cost and decrease the quality of the housing that remains open to them. *Each discriminatory device reinforces the effectiveness of every other discriminatory device.* Their impact on black and minority persons is cumulative and devastating.

²⁶ See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (KERNER COMMISSION) (Bantam Ed. 1968), p. 1.

The racial prejudices that fueled the Proposition 14 (former Art, 1 §26, Calif. Const.) campaign²⁷ have left a bitter legacy in California and contributed to the "tax-payers' revolt" as regards public housing and other projects widely perceived as of special benefit to minorities. This "revolt" has made prior referendum approval for any such project extremely difficult to secure. (See Brief of Appellant Shaffer in No. 226 at 32, n. 20). Although the open bias exhibited while Proposition 14 was in effect²⁸ has largely ended, these discriminatory practices have again become covert. Blacks and other minorities in California consequently cannot compete on an equal basis for housing

²⁷ See Affidavits in Support of Motion for Summary Judgment, App. pp. 125-136.

²⁸ See, for example, Affidavit of Elaine Eisenberg, Member of San Mateo County Human Relations Commission, Appendix pp. 125-126:

"... After Proposition 14 was passed, . . . attempts were made to find housing for black families.

"Common reactions from realtors and homeowners in the County was 'wouldn't they be happier with their own people,' 'I will show you where blacks can rent—in black ghetto areas,' 'I personally have no bias, but my neighbors would object,' 'my other tenants would move out,' or flat 'no's.' These discriminatory attitudes were and still are widespread throughout the County.

"The emphasis was always on finding houses and apartments to rent, because minority persons did not have enough money to buy homes. . . .

"There has been no real change in attitude, even now with Proposition 14 off the books. . . .

"When Proposition 14 was in effect, I received many threatening calls from persons who did not want equal opportunity in housing, and blacks received flat denials when they attempted to find houses; while this overt prejudice is not as apparent today, the underlying discrimination is. The practices are more subtle, and evasive, but the result is the same. . . . *The desire to keep blacks with money out of white neighborhoods is even stronger when the blacks are persons of low income. The housing problem today is critical.*" (Emphasis added)

This affidavit was uncontradicted.

in the private market. Cf. *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 931. For many of them, low income public housing represents their only hope for decent, safe and sanitary housing."

Nor is California unique for the pervasiveness of its housing discrimination. Across the land "real estate brokers and mortgage lenders are largely dedicated to the maintenance of segregated communities." *Reitman v. Mulkey*, *supra*, at 381 [Douglas, J., concurring]. Restrictive "neutral" zoning ordinances exclude minority groups. See, e.g., Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1968). Discriminatory private marketing practices, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Lee v. Southern Home Sites Corp.*, — F.2d — (5th Cir. No. 28167, July 13, 1970) are widespread. Public agencies have been found to perpetuate segregation in administration of site location in public housing projects, *Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill. 1969); *Hicks v. Weaver*, 302 F. Supp. 619 (E.D. La. 1969), in relocating displacees, *Norwalk CORE v. Norwalk Redevelopment Agency*, *supra*; and in misuse of regulatory procedures to prevent the construction of housing for blacks, *Kennedy Park Homes Association v. City of Lackawanna*, — F. Supp. — (W.D.N.Y. August 13, 1970) (expedited appeal pending, No. 35320, 2nd Cir.).

One final variety of devices that effectively perpetuate residential segregation attempts to conceal the discriminatory object behind a "democratic" referendum. See *Hunter v. Erickson*, *supra*, and *Reitman v. Mulkey*, *supra*, invalidating respectively the use and the product of such referenda. The lower court cases upholding the use of referenda,

²⁹ See Affidavit of William G. Weman, Executive Director of the Housing Authority of San Mateo County, Appendix pp. 122-124.

on which Appellant Shaffer heavily relies,³⁰ are all distinguishable. In *Ranjel v. City of Lansing*, 417 F.2d 321 (6th Cir. 1969), *cert. den.* 397 U.S. 980 (1970), the Sixth Circuit reversed a District Court decree enjoining such a referendum. The *Ranjel* situation differs fundamentally from the case at bar in that the proposed referendum there was a *subsequent* referendum in review of a legislative decision relating to a zoning change which would permit a low rent development. In *Southern Alameda Spanish Speaking Organization v. City of Union City*, 424 F.2d 291 (1970), the Ninth Circuit refused to nullify the result of a referendum cancelling a similar zoning change. But as in *Ranjel*, the referendum in question was of the ordinary type, *subsequent* to the legislative action reviewed. In a third case, *Spaulding v. Blair*, 403 F.2d 862 (1968), the Fourth Circuit refused to bar the submission of a state open housing enactment to the electorate for approval or rejection by referendum. Here again, the constitutional challenge was directed at a subsequent referendum, which was a mere repealer, not a bar to subsequent action, as in *Hunter*, *Reitman* and this case. The Fourth Circuit merely held that fair housing legislation was subject to the same review by referendum as all other state legislation, and was at pains to point out that the Maryland referendum had no *future* effect, 403 F. 2d at 864. The gravamen of appellee's position here is that Article 34 does have prospective effect, and that it applies an extraordinary requirement of prior review which does not (unlike the Maryland provision) apply generally to other legislation. In none of these three cases did the referendum force future housing measures to run a special gauntlet.

The cases just discussed do indicate how widely the referendum device has been used to exclude blacks and

³⁰ Brief of Appellant Shaffer in No. 226 at 58-60.

other minorities from predominantly white areas like San Mateo and Santa Clara Counties. To a great extent, then, measures like Article 34 which raise insuperable obstacles to low rent housing are in effect integral parts of a nationwide housing pattern (not everywhere intentionally contrived) that perpetuates residential segregation by race.

The analogy between the housing area and other important fields is instructive. There, too, legislation and constitutional litigation have all but eliminated the gross forms of open discrimination by race. But in those fields, as in housing, a whole range of devices superficially neutral but covertly discriminatory has been developed as a result of resourceful manipulation and the "accidental" workings of economic realities.³¹

³¹ "Freedom of choice" school enrollment plans, *Green v. New Kent County School Board*, 391 U.S. 430 (1968); and dual school systems within "desegregated" districts, *Alexander v. Holmes*, 396 U.S. 19 (1969), are among those devices to resist school integration which have been recently struck down. In the voting rights area, grandfather clauses fell long ago, *Guinn v. United States*, 238 U.S. 347 (1915); but more recent and subtler devices never cease coming to light, including stringent and discriminatorily applied literacy tests, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Louisiana v. United States*, 380 U.S. 145 (1965), cf. Voting Rights Act of 1965 (42 U.S.C. §1973), Voting Rights Act Amendments of 1970 (42 U.S.C. §§1973b et seq.); poll tax and other property requirements, *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), *Cipriano v. City of Houma*, 395 U.S. 701 (1969), and political gerrymanders, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). Discriminatory denials of equal employment opportunity have been recognized and enjoined on statutory grounds where the denials resulted from the application of superficially neutral seniority systems, *Local 189, United Papermakers and Paperworkers v. United States*, 416 F. 2d 980 (5th Cir. 1969), *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968), or test and diploma requirements, *Arrington v. Massachusetts Bay Transportation Authority*, 306 F. Supp. 1355 (D. Mass. 1969), contra *Griggs v. Duke Power Co.*, 420 F. 2d 1225 (4th Cir. 1970), cert. granted 399 U.S. 926 (1970).

The relationship between housing and such opportunities as education, local voting rights, and employment is significant. Full enjoyment of equality in these crucial fields depends to a large extent on the availability of appropriate housing. This Court has previously invalidated racially discriminatory measures cloaked in the robes of democratic procedures and falsely "neutral" regulatory measures. The Court should in this case invalidate Article 34's discrimination against equal access to housing.

C. *The Racial Classification Inherent in Article 34 Cannot Be Constitutionally Justified. It Should Be Declared Invalid Under Appropriate Equal Protection Standards.*

A governmental classification which works to the disadvantage of a racial minority is subject to an effectively insuperable burden of justification. Because historically the central purpose of the Fourteenth Amendment is to protect racial minorities, *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964), an official racial classification "even though enacted pursuant to a valid state interest, . . . will be upheld only if it is *necessary*, and not merely rationally related to the accomplishment of a permissible state policy." *Id.* at 196 (emphasis added). This Court reiterated the principles governing such cases in invalidating Akron's very similar referendum requirement in *Hunter v. Erickson*:

Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, *Slaughter-House Cases*, 16 Wall 36, 71 (1873); *Strauder v. West Virginia*, 100 U.S. 339, 344-345 (1880); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Loving v. Virginia*, 388 U.S. 1, 10 (1967), racial classifications are "constitutionally suspect," *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), and

subject to the "most rigid scrutiny," *Korematsu v. United States*, 323 U.S. 214, 216 (1944). They "bear a far heavier burden of justification" than other classifications, *McLaughlin v. Florida*, 379 U.S. 184, 194 (1964). *Hunter v. Erickson*, 393 U.S. at 392.

In fact, once the racial classification has been found, no state action has ever been found to meet this extraordinary burden of justification.

Certainly California has presented no "compelling state interest" sufficient to justify the racial distinction worked by Article 34. Yet only such an interest could support the measure's constitutionality. *Shapiro v. Thompson*, 394 U.S. 618, 633-634 (concurring opinion of Justice Stewart) and 659 (dissenting opinion of Justice Harlan). The mere fact that the Article was adopted by popular referendum is no basis for finding it valid. "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be," *Lucas v. Colorado General Assembly*, 377 U.S. 713, 736-737 (1964). *Lucas* struck down an attempt, by means of popular vote adopting a state constitutional amendment, to validate an apportionment scheme which would have violated federal constitutional standards. Surely the right to be free from state supported racial discrimination is no less fully protected than the right to an undiluted vote. Nor can Article 34 be justified because it submits all future questions to popular decision. As this Court stated in *Hunter v. Erickson*, "The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed." 393 U.S. at 392.

We have already presented our reasons for contending that California has no rational or reasonable interest in

the poverty-based scheme of Article 34.³³ We submit that these same reasons apply even more forcefully to show that there was no adequate justification for this scheme's racially discriminatory effects. In the absence of sufficient justification, Article 34 invidiously denies to minorities the Equal Protection of the laws guaranteed by the Fourteenth Amendment, and should be declared unconstitutional.

III.

By Effectively Denying to Negroes Access to Housing Equal to That Available to White Persons, Article 34 Imposes on Negroes a Badge and Incident of Slavery, and Constitutes A Denial of the Equal Right to Purchase, Lease and Hold Real Property, Mandated by 42 U.S.C. §1982.

On its face, Article 34 creates a classification on the basis of wealth. It places a burden on the availability of subsidized low rent housing—the only type of decent housing which many poor persons can afford—while placing no similar limitation on those whose income permits them to purchase housing in the private market.³⁴ Further, the close correlation between poverty and minority group status results in Article 34 having a racially discriminatory impact. This results in denying to Negroes equal opportunity to "lease . . . real . . . property," 42 U.S.C. §1982, and in "herd[ing] men into ghettos, . . . a relic of slavery," *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 442, in violation of the Thirteenth Amendment.

³³ See Part I, *supra*.

³⁴ This is true although private housing is often likewise subsidized, in a less obvious manner, by federal housing programs. See N. 9, *supra*.

We do not contend that section 1982 or the Thirteenth Amendment compel government to provide funds to poor Blacks to enable them to purchase any home which a white man, however wealthy, may purchase. However, given the fact that Congress has determined that it is necessary to provide low rent housing for the poor, 42 U.S.C. §§1401, 1441, which, as was found by the district court, "will be predominantly occupied by Negroes or other minority groups" App. p. 174, the question becomes whether the state can grant to the white majority the right to exclude such housing, and the persons who will live in it, from their communities, consistent with the Thirteenth Amendment.

In *Jones v. Alfred H. Mayer Co.*, *supra*, this Court, declared:

[T]his Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery—its "burdens and disabilities"—included restraints upon "those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property as is enjoyed by white citizens." *Civil Rights Cases*, 109 U.S. 3, 22. Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery. 392 U.S. at 441-443 (footnote omitted).

Under the facade of encouraging local democracy, through referendum, Article 34 permits precisely what the opponents of the Thirteenth Amendment and the statutes enacted under it contended it would prohibit. It gives white

citizens, who constitute the majority of the communities here involved, the ability "to determine who [would] be members of [their] communit[ies]" ³⁴

It requires little investigation or understanding to see the vote against public low rent housing for what it is—a vote to keep blacks out of the community, or at least to keep them in the deteriorating ghetto housing to which the private housing market restricts them. The court below had no difficulty reaching the conclusion that the impact of Article 34 "falls upon minorities." App. p. 176, esp. N. 2. That housing discrimination limits the ability of poor blacks, and even those with sufficient income, to find decent housing, is clear in San Mateo and Santa Clara Counties,³⁵ as it is nationwide.³⁶

A private housing developer is barred by Section 1982 from refusing to sell to Negroes because the majority of his white purchasers do not want Negro neighbors. *Jones v. Alfred H. Mayer Co.*, *supra*. Here the majority speaks through the ballot, rather than by an agent, but its message is the same. If the Thirteenth Amendment and section 1982 do not extend to prohibit this, then their words are written in sand.

At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.³⁷

³⁴ Cong. Globe, 39th Cong., 1st Sess., 498; quoted in *Jones v. Alfred H. Mayer Co.*, *supra* at 433.

³⁵ See NN. 23, 28, *supra*.

³⁶ See N. 24, *supra*, and accompanying text.

³⁷ *Id.* at 443.

CONCLUSION

The Court should hold that Article 34 of the California Constitution is unconstitutional as a denial of equal protection to the poor and to members of racial minorities, and as an encouragement of private discrimination and a denial of equal opportunity for Negroes to secure decent housing. The decision below should be affirmed.

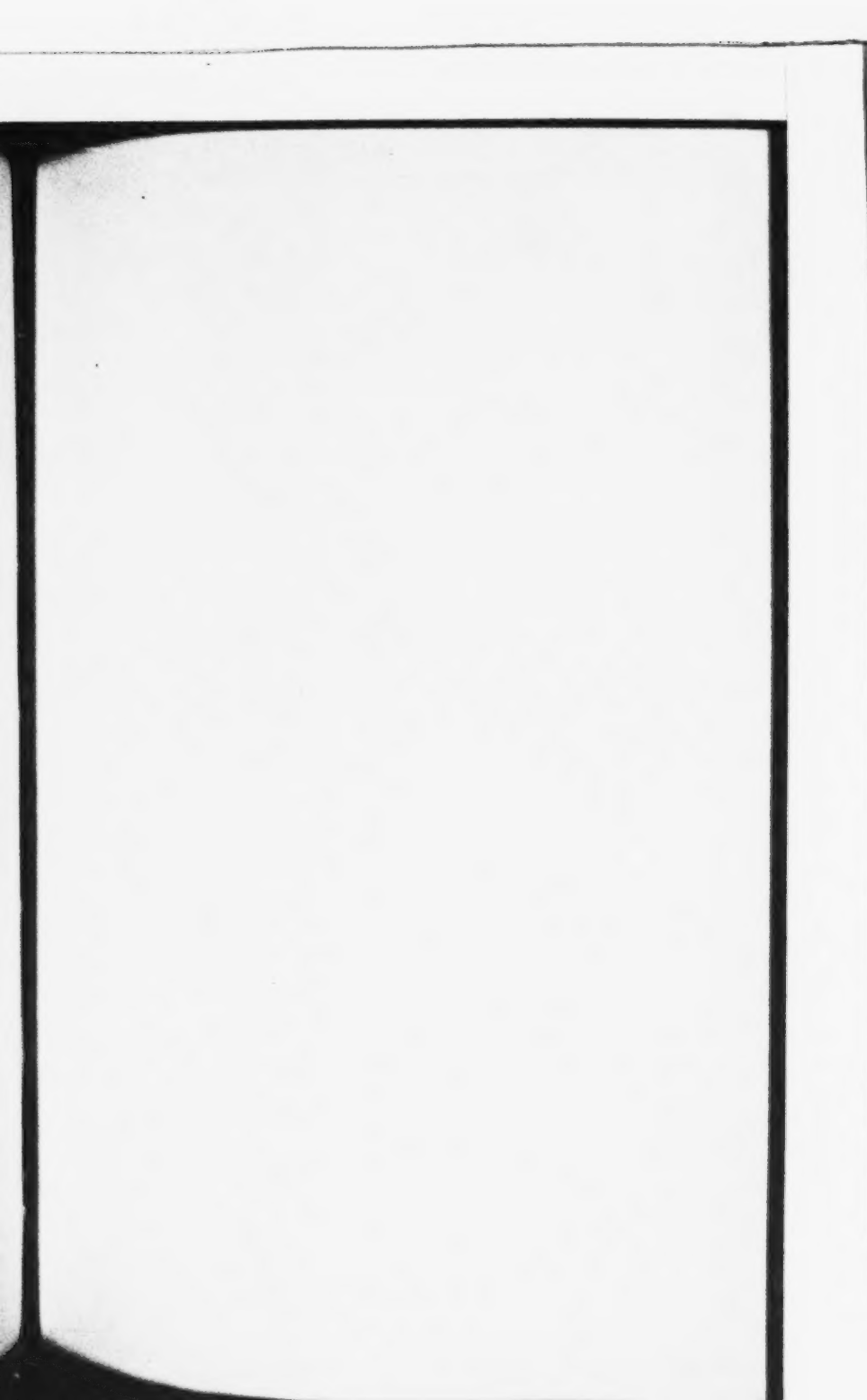
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* In recent years, it has become common for law students and recent law school graduates to assist in public interest legal work, and the custom has developed of recognizing the efforts of those who are not yet admitted to the bar. In keeping with this custom, counsel for the amici acknowledge with appreciation the able assistance in the preparation of this brief of Morris J. Baller, Harvard Law School Class of 1970, a Reginald Heber Smith fellow assigned to the National Office for the Rights of the Indigent.



**IN THE
Supreme Court of the United States
OCTOBER TERM, 1970**

No. 154

RONALD JAMES, et al., Appellants

v.

ANITA VALTIERRA, et al., Appellees

No. 226

VIRGINIA C. SHAFFER, Appellant

v.

ANITA VALTIERRA, et al., Appellees

**MOTION FOR LEAVE TO FILE A BRIEF
AS AMICI CURIAE**

Now come The National Urban Coalition, the Alliance for Labor Action, the American Federation of Labor and Congress of Industrial Organizations, the American Institute of Architects, the Lawyers' Committee for Civil Rights Under Law, the National Association for the Advancement of Coloured People, the National Association of Building Manufacturers, the National Association of Home Builders, the National Association of Intergroup Relations Officials, the National Committee Against Discrimination In Housing, the National Housing Conference, the National Tenants Organization, the National Urban League, the Pacific Southwest Regional Council of the National Association of Housing and Redevelopment Officials, the Rural Housing Alliance, and Suburban Action Institute, and respectfully request that this honorable Court grant permission for the filing on their behalf of the brief *amicus curiae* accompanying this motion.

Petitioners are national or regional organizations, all concerned with the inability of a substantial segment of our society to obtain adequate housing in desirable locations. The specific interest of each separate organization is set forth in more detail in the body of the brief accompanying this motion.

Because the petitioners are national or regional in nature they are able to discuss the issues of this case in the broad factual context of national housing problems, and to demonstrate that the California practices held invalid by the court below have a severe impact on our country's attempt to provide adequate housing for all its citizens.

Petitioners requested consent to the filing of a brief *amicus curiae* from all parties to these proceedings but consent was refused on the part of the Appellant Shaffer and the Appellant James et al.

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October, 1970

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On Appeal From The United States District Court For
The Northern District of California

Brief Of The National Urban Coalition, *et al.*

The organizations who have joined together to file this brief represent a wide range of people in the United States who produce and design housing, who administer or provide technical assistance with respect to subsidized housing, and who are the intended beneficiaries of such programs. They share a common concern that a substantial segment of American society is unable to secure adequate housing in a suitable environment and believe that the California practice held invalid by the Court below has a severe impact on the achievement of national housing goals.

THE INTEREST OF THE AMICI

The National Urban Coalition

On August 24, 1967, at an emergency convocation in Washington, D.C., a group of 1,200 persons issued an urgent appeal on the urban crisis to all concerned Americans. They were men and women of diverse interests. Yet they joined together in a national effort to mold a new

political, social, economic and moral climate to help break the vicious cycle of urban poverty and the ghetto. This convocation began The National Urban Coalition.

The Coalition is governed by a steering committee of industry, civil rights, labor, and church leaders and mayors.

The emergency convocation called upon the nation to take bold and immediate action to provide "a decent home and a suitable living environment for every American family" with guarantees of equal access to all housing, new and existing. The Coalition has advocated appropriate public and private action to move toward these objectives, and has stimulated the collaboration of other organizations on this issue of common concern. The Coalition has provided technical assistance to local urban coalitions, particularly to make the public housing program a focus of national and local reform efforts. It believes that affirmation of the District Court's holding is vital to the success of these efforts.

Alliance for Labor Action

The Alliance for Labor Action (ALA), a voluntary unincorporated association of labor unions, with a membership of approximately 4,000,000 workers in the United States and Canada, was formally established in May 1969 at a founding conference attended by more than 500 delegates from the United Automobile Workers (UAW) and the International Brotherhood of Teamsters. In August, 1969, the International Chemical Workers Union of Akron, Ohio and in April 1970, the National Council of Distributive Workers of America, affiliated with the ALA.

ALA was organized to assist all bona fide labor organizations which are prepared to cooperate in and contribute to joint efforts to advance the interests of workers and their families and to join with others in the community to promote the general welfare and to improve the quality of life for all Americans.

ALA also devotes its efforts and contributes its resources

to the task of organizing the unorganized, strengthening collective bargaining and to dealing with critical political, social and economic problems. More than two dozen ALA supported community unions and self-help organizations across the nation are now involved to some extent in programs which seek to improve the quality and quantity of housing for low and moderate income groups. ALA also purchased stock in the National Corporation for Housing Partnerships of Washington, D.C.

At its founding conference, ALA pledged "an all out effort at the national and community level to mobilize the national commitment needed to meet and solve the housing needs." Further, ALA seeks to work with all concerned groups in a cooperative effort to maximize community participation, to contribute seed money and to cooperate in making pension funds available for the financing of housing, and to give special emphasis to the special housing needs of retired workers, low and moderate income families and of migratory workers.

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a Federation of 121 national and international labor unions representing 13,500,000 working men and women. The AFL-CIO is firmly committed to the proposition that improvement of housing conditions in this country is a vital national priority. The Federation has, therefore, worked to secure legislation at both the State and Federal level for a sound over all housing program including public housing for the poor. The decision below furthers the cause of providing decent living accommodations for every American and it is for this reason that the AFL-CIO joins in this *amicus* brief seeking affirmance of the decision below.

The American Institute of Architects

The American Institute of Architects is a professional

society representing approximately 24,000 licensed architects. The AIA has consistently supported Federal and state legislation aimed at fulfilling the nation's housing needs. The lack of decent housing for low and moderate income families has been of particular concern to the architectural profession. Accordingly, the Institute believes that the U.S. Supreme Court's disposition of the voter referendum issue in the Valtierra Case will be a significant precedent in the effort to provide suitable housing for all Americans.

The Lawyers' Committee for Civil Rights Under Law

The Lawyers' Committee for Civil Rights Under Law, a non-profit private corporation organized in 1963, has become increasingly concerned with urban problems. In 1968, the Committee initiated an Urban Areas Project with the aid of a grant from the Ford Foundation. In close cooperation with the National Urban Coalition, the Committee's national and local offices have actively engaged the service of lawyers in an attack upon urban problems in such areas as housing, education, and economic development. In the field of housing, it has been concerned with a number of critical problems, including rights of tenants for hearings prior to adoption of rent increases, the location and racial composition of proposed public housing projects, and recently, several of its offices have become particularly active in contesting the constitutionality of suburban government practices which restrict the availability of low income housing. The Committee's interest in the present case arises from these concerns.

National Association for the Advancement of Coloured People (Special Contribution Fund, Inc.)

The National Association for the Advancement of Coloured People, organized in 1909, is the oldest and largest civil rights organization in the country. It has a membership of 470,100 persons in 1,700 branches located in the 50 states. The principal objective of the organization is

to ensure the political, educational, social and economic equality of Negro citizens. It endeavors to remove all barriers of racial discrimination through the democratic process. The NAACP attempts to make the legal and political system responsive to the needs of the Negro minority. Negroes, however, by being effectively excluded from suburbia, are unable to inject themselves into suburban communities and are thereby denied an opportunity to resist these exclusionary practices. A requirement that public housing be put to referendum under these circumstances insures that Negroes will continue to be contained in the inner city ghettos.

National Association of Building Manufacturers

The National Association of Building Manufacturers was established in 1943 (as the Prefabricated Home Manufacturers Institute) in response to the need for fast, low cost defense buildings.

With the rapid growth of industrialized building, the Association has grown in 18 recent months from 77 to 330 member firms, including 180 building material supplier companies and 140 building manufacturers producing homes, apartments, classrooms and other commercial buildings.

The National Association of Building Manufacturers believes that the shortage of decent housing for all American families is the greatest crisis facing the nation. In 1969 members of the Association produced 287,000 dwelling units, as well as a wide variety of other structures. The goal and slogan of the Association is "Housing America."

The Association believes this goal would be advanced by upholding the decision of the District Court.

National Association of Home Builders

National Association of Home Builders of the United States ("NAHB") is the trade association of the home building industry. Its membership, totaling approximately

51,000, is affiliated in 480 local and state associations and represents builders of both single family homes and apartments. It is estimated that the members of the Association build approximately two-thirds of all homes and apartments constructed by professional builders in the United States.

It has long been NAHB's basic objective to strive toward the goal of a decent home for every American family. While it believes this can best be accomplished through maximum reliance on private enterprise, the Association recognizes that a portion of the total housing need can only be met by governmentally funded or assisted projects.

As a matter of basic principle, NAHB is opposed to any statute requiring prior approval by referendum of the residents of any community as a condition precedent for construction of additional housing within that community. Such a condition, if permitted, would quickly become a serious addition to the many obstacles obstructing attainment of the objective of proper housing for the American people. Only too often local municipal ordinances and referenda constitute, in effect, a potent method either to prevent entirely construction of homes or apartments for low and middle income families or to bring about discrimination on an economic basis between families in the community. NAHB, therefore, joins in urging the Court to uphold the action of the District Court in finding Article XXXIV patently unconstitutional.

National Association of Intergroup Relations Officials

The National Association of Intergroup Relations Officials is a non-profit corporation which was created in the state of Illinois on November 12, 1948, and now maintains a national office in Washington, D.C.

NAIRO is a professional association concerned with advancing intergroup relations, knowledge and skills, and improving the standards of intergroup relations practice,

and furthering the understanding and acceptance of the goals and principles of intergroup relations work. It publishes a professional journal and newsletter. It conducts professional conferences, and it serves in an advisory capacity to government and private agencies.

NAIRO has maintained a continuous interest in many aspects of housing and many of the articles in the Journal of Intergroup Relations, the professional publication of NAIRO, have related to housing problems, particularly in the fair housing field. NAIRO has sponsored several local and national conferences relating to housing and community development.

National Committee Against Discrimination In Housing, Inc. (NCDH)

Founded in 1950, the National Committee Against Discrimination in Housing, Inc. (NCDH) is a non-profit public interest organization working to achieve a slum-free, ghetto-free America in which every family secures a decent home in an open housing market with maximum freedom of choice. Program activities include consultation and technical assistance, direct field services, research, demonstration projects for developing new approaches and techniques, conferences, fact-finding and publication, including the preparation, interpretation and distribution of accurate and current information in the housing civil rights field. The program is carried out in cooperation with 47 national civil rights, religious, labor and civic organizations.

NCDH has long been deeply involved in and concerned with the danger to our democracy arising out of discrimination and segregation in housing. It believes that white suburban communities must not be allowed to build walls against the entry of the poor and minority citizens. For these reasons it joins this brief against a state constitutional provision which reinforces the power of local communities to bar housing for the poor.

National Housing Conference

The National Housing Conference is a non-profit citizens organization focused primarily on generating leadership and support for progressive Federal legislation on housing, urban renewal, and related community development. Its membership and its Board of Directors represent a cross-section of national, professional, and community leaders committed to this legislative cause.

Since its formation in 1931, and especially since World War II, the Conference has germinated the concepts behind most of the basic legislative advances which constitute the life-blood of housing and community development. The National Housing Conference also has played a most significant role in developing the public and political understanding and support essential for the enactment of these legislative advances.

Because the National Housing Conference has always represented the broad public interest in its field, it has earned the confidence and respect of Congressional leaders on housing and related legislation. It provides advice and guidance on legislation to a wide spectrum of national public interest organizations and works closely with Federal and local administrative officials. The National Housing Conference also cooperates with private enterprise groups on issues of common interest.

The National Housing Conference has always strongly supported the expansion and improvement of the low-rent public housing program, and it believes that upholding the result below will contribute to that objective.

National Tenants Organization

The National Tenants Organization is a corporation of nation-wide membership whose purpose is to promote and further the legal, social, political, and economical rights of all poor and exploited tenants throughout the nation. The National Tenants Organization has approximately 200 affiliated local tenant organizations in 25 states which

represent several hundred thousand tenants. A major portion of these tenants are public housing residents and/or applicants, and most of the individual members are living in deplorable housing. One of the primary objects of these tenants is to cause a large increase in the number of government financed housing units available to the poor generally, and more particularly, an increase in such housing in desirable communities. Consequently, the National Tenants Organization has a vital concern in this litigation challenging the California referendum requirement for construction of new public housing.

National Urban League, Inc.

The National Urban League is a professional community service organization seeking to secure equal opportunity for Negro citizens and other disadvantaged persons.

The National Urban League is a non-profit corporation whose national headquarters is located at 55 East 52nd Street, New York, New York 10022. It has regional offices in New York, Los Angeles, Atlanta, Akron and St. Louis. It also has a Washington bureau located in Washington, D.C. It has affiliates in 97 cities and is non-partisan and interracial in its leadership and staff. A trained, professional staff conducts the day-to-day activities of the League, applying expert knowledge and experience to the resolution of social problems.

A primary goal of Urban League affiliates in housing and urban development is to create opportunities for choice of living environments for lower income, moderate income and minority families. Other goals are to provide opportunities for minority entrepreneurs and workers in housing development projects.

The Urban League's housing program represents consumers and communities in the use of government housing programs and aids in private development system. Many of the 97 Urban League affiliates have formed non-profit development corporations to initiate and participate in housing and community development and to negotiate with

private and government agencies (national, state and municipal) to promote their goals in development.

These affiliates consider their housing work to be in the context of a national network of mutually interacting national and local strengths for developing and using tools to accomplish NUL housing goals of rehabilitation and new housing. They seek to participate in the development of standard housing for all persons.

The Pacific Southwest Regional Council of the National Association of Housing and Redevelopment Officials

The Pacific Southwest Regional Council of the National Association of Housing and Redevelopment Officials is the professional association of public officials of local housing and redevelopment agencies in the States of California, Arizona, Nevada and Hawaii and the Territory of Guam. Membership in the Council includes officials from 55 local housing authorities in the State of California, all of whom administer low rent housing programs adversely affected by the California constitutional provision which is the subject of this appeal.

Rural Housing Alliance

The Rural Housing Alliance is a non-profit membership corporation organized in 1966 following the convening of the First National Self-Help Housing Conference in Warrenton, Virginia. Organized initially as the International Self-Help Housing Association, the organization was established to serve as a clearinghouse of information on self-help housing. In the spring of 1969, the organization changed its name to the Rural Housing Alliance, reflecting the expanding organizational concern with the variety of housing and community needs in small towns and rural areas.

RHA provides assistance to local groups through publications, demonstrations, workshops, correspondence and consultation. Field staff members work directly with groups

engaged in developing low income housing projects. In addition, research information and educational materials are disseminated through bulletins, newsletters, booklets, handbooks, pamphlets, reports, films, and through other available media.

Suburban Action Institute

Suburban Action is a nonprofit foundation supported organization for research and action in the suburbs. It was established in May, 1969, to focus public attention on the role of the suburbs in solving metropolitan problems of race and poverty.

The goals of Suburban Action include: opening suburban land to low- and moderate-income and minority group families, and creating new opportunities for linking suburban jobs and unemployed and underemployed residents of central city slums and ghettos. It supports the result below as contributing to these goals.

To help achieve these goals, Suburban Action undertakes programs in housing, employment, land use and municipal taxation and carries out the research needed to support these programs. Suburban Action believes in the need to remove constraints to the development of decent housing, near job opportunities that can be afforded by disadvantaged groups in urban America.

SUMMARY OF ARGUMENT

As the briefs of the parties fully set forth the proceedings below, amici will not repeat them here. Briefly stated, the United States District Court for the Northern District of California voided Article XXXIV of the Constitution of the State of California, which required a referendum for the construction of each public housing project in that State. The court below correctly invalidated Article XXXIV on summary judgment. By proceeding thus directly to the constitutional issue, the District Court conveyed its conclusion that Article XXXIV, purely by virtue of the plain meaning

of its words, is so patent and irredeemable an infringement of constitutional rights as to make a trial irrelevant. Thus Appellant Shaffer's argument (Appellant's brief, pp. 25-31) that the factual record below was inadequate is beside the point.

The sharply discriminatory design of Article XXXIV is obvious and not denied. It provides that "No low rent housing project shall hereafter be developed . . . by any state public body until a majority of the qualified electors . . . approve such project by voting in favor thereof . . ." Its precise purpose is to subject all low-income public housing proposals, but not housing distinguishable only by the wealth of the intended occupants or the sponsor's identity, to the hazards of referendum. Lest there be doubt of their purpose, the draftsmen defined "low rent housing project" to mean any development of housing "for persons of low income," financed or assisted by the state or federal government, and went on in even more detail to define "persons of low income" as "persons or families who lack the amount of income which is necessary . . . to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding." A more explicit purpose to discriminate against the poor can hardly be conceived.

Given the discrimination inherent in Article XXXIV, the constitutional issue it presents can be very narrowly stated. We may assume (because Article XXXIV itself assumes) that every public low-income housing proposal sent to trial by referendum complies with all local codes applicable to physically similar private housing. We may further assume (because Article XXXIV itself assumes) that every public low-income housing proposal submitted to the voters has already been judged desirable by the sponsoring local housing agency and by HUD (which must be persuaded to provide subsidy); and that it has, moreover, found favor in the normal political give-and-take of the local governing body (whose approval is required by California Health & Safety Code §34313).

Thus neither the validity of restrictive general codes nor the existence of an affirmative duty on any government's part to provide low-income housing is in issue in this case. The issue here is much narrower and easier: It is whether a State may require that proposals for low-income housing, and only low-income housing, be subjected to referendum even though such proposals meet the requirements of local codes, the local housing authority, the local governing body, and the United States Department of Housing and Urban Development.

That the burden imposed by Article XXXIV discriminates against public housing for the poor, as compared with all other housing, is explicit. Less explicit, but equally apparent, is the adverse impact on minority groups who make up a disproportionately large segment of the "low-income persons" affected by the statute. The alleged reasons for the discrimination—the purported adverse physical, sociological or fiscal effects of low-income housing—fall apart upon examination. The only credible explanation for the discrimination is both irrational and invidious: the desire of white middle and upper class communities to bar from entry or continued residence in their areas the poor who cannot afford housing offered in the regular market. Because there is not even a rational basis for the discrimination, it is, *a fortiori*, not justified by any compelling state interest—the applicable standard in this case of explicit discrimination against the poor.

Not only does Article XXXIV discriminatorily and unjustifiably restrict the plaintiffs' housing opportunities, it also infringes another legally protected interest of plaintiffs—their right to full and fair participation in their locality's political process. Having established a general mechanism for participation in the political process, the state may not bias that process in a manner that arbitrarily restricts the opportunities or dilutes the influence of any class of substantially interested citizens.

In addition to violating plaintiffs' rights under the equal protection clause, discussed above, Article XXXIV violates

the plaintiffs' interest in free travel and migration, an interest which occupies a constitutionally protected status quite apart from equal protection. This court has once held that California may not prohibit directly the immigration of indigents; it should not be permitted to evade this ruling by indirection.

Finally, we point out that the ultimate effect of Article XXXIV and other local approval requirements has been to cause low-income housing in metropolitan areas to be restricted to neighborhoods already occupied by the poor and minority groups. The benefits of the program have been effectively conditioned on the recipients' willingness to remain in segregated neighborhoods. By fostering segregated neighborhoods the local option aspects of the low-income housing program have deprived the plaintiffs of equal protection of the laws, and have accelerated what the Kerner Commission called the deepening racial division of America.

In summary, this case presents the Court with a provision of the California Constitution that:

- a) On its face discriminates against the poor in their efforts to obtain a basic human need, decent housing, without advancing any rational, much less compelling, State interest;
- b) inevitably discriminates against nonwhites and other minority groups who constitute a disproportionate share of the persons seeking subsidized low-income housing;
- c) dilutes and debases the political voice of such groups; and
- d) burdens the basic freedom of persons to travel and migrate throughout the nation.

The Court may uphold the decision below by drawing on any or all of these reasons. But it may not reverse the result below without rejecting all of them and, at the same time, contending a program of housing subsidies admin-

istered by California in a manner that unconstitutionally confines the poor and minority groups to their existing areas of residence.

ARGUMENT

I

ARTICLE XXXIV DISCRIMINATES AGAINST AND INJURES THE POOR, BECAUSE IT EXPRESSLY SINGLES OUT THEIR HOUSING FOR SPECIALLY BURDENSOME TREATMENT WHICH CAN ONLY LIMIT THEIR HOUSING OPPORTUNITIES, NOT EXPAND THEM, AND CANNOT LIMIT THE HOUSING OPPORTUNITIES OF ANYONE WHO IS NOT POOR.

At the most superficial level, the class "discriminated against" by Article XXXIV might appear to be the local housing authorities—the sponsors of that housing which, for no rational reason, is singled out for uniquely onerous approval procedures. Yet no claim is made for constitutional rights on the part of the authorities. Article XXXIV is unconstitutional not because it arbitrarily restricts the freedom of the housing authorities, but because in so doing it inevitably restricts the opportunities of public housing eligibles to obtain decent, safe, and sanitary housing in the locale of their choice. Those who must suffer this restriction of opportunity are, by virtue of Article XXXIV's express words, "persons of low income."

Plaintiffs need not show that such a discriminatory restriction of opportunity was an objective explicitly acknowledged, or even intended, by the draftsmen of Article XXXIV. Invidious discrimination may be shown not only by inadequately rebutted inference from the actual results of a challenged state action or practice,¹ but also by

¹ *Gomillion v. Lightfoot*, 364 U.S. 339. Cf. *Yick Wo v. Hopkins*, 118 U.S. 356.

inadequate justification of the natural and foreseeable results of such practice.²

Appellant Shaffer, apparently analogizing the present case to *Yick Wo v. Hopkins*,³ argues that Article XXXIV cannot be shown to have a discriminatory effect because the voters on many occasions have voted to approve public housing projects. The analogy, however, is inapt. Article XXXIV's true effect simply cannot be gauged statistically. To begin with, its effect is not adequately measured by the number of projects rejected by the voters, for such a measure ignores the number that were never submitted to the voters because of the expectation that they would be disapproved. (A. 21-24, 31-33). Obviously, no statistics are likely to record the number of projects that aborted in the minds of the housing authorities or local city councils without ever reaching the voters.⁴

² Cf. *Harper v. Board of Elections*, 383 U.S. 663; *Griffin v. Illinois*, 351 U.S. 12.

³ 118 U.S. 356.

⁴ A hint of what such statistics might show if they were available can be gleaned from a comparison of California with New York, a state of similar size which has no referendum requirements. These statistics illustrate the sharp reduction in public housing production that has taken place since 1950 when Article XXXIV was adopted.

	Dec. 31, 1950	Dec. 31, 1969
California	34,185 units	45,892 units
New York	33,306 units	92,258 units

U. S. Dept. of Housing and Urban Development, S101 Low-Rent Project Directory, Dec. 31, 1969, at pp. 32 ff. & 141 ff.; HHFA 4th Annual Report, 1950, p. 405. Both States have similar levels of poverty, measured by the 1969 level of AFDC recipients: 1,045,000 in New York, 1,122,000 in California. U.S. Bureau of the Census, *Statistical Abstract of the U.S.* 299 (1970). The San Francisco Regional Office of HUD reports that, based on inquiries already received after the lower court's decision in this case, "it is anticipated that many communities will seek approval of applications for new, or greatly expanded, permanent low-rent programs in California in the immediate future, particularly for turnkey development." HUD Housing Assistance Office, Region VI, Low-Rent Housing Production Forecast 4/1/70 to 12/31/70, p. ii. The contrast between New York and California with regard to public housing starts is not reflected in Federal Housing Administration programs for persons who are not poor. See n. 125, *infra.* and accompanying text.

More fundamentally, however, statistical proof is beside the point because discriminatory effect is endemic in Article XXXIV—unlike the ordinance in *Yick Wo*. Article XXXIV can operate only to defeat, never to promote, housing for the poor. It cannot impede the provision of housing for anyone else. It comes into play only when a project for housing the poor would otherwise have been allowed to go forward. That the full gravity of the poor's injury can in the nature of the case never be shown by statistics simply reflects that the discrimination against them is systemic and structural—not accidental, contingent, or situational.

Article XXXIV positively favors, facilitates, and encourages the registration of voter prejudices tending towards systematic bias against housing for the poor. In California, housing produced by a private developer must of course comply with valid zoning restrictions, subdivision regulations, and building codes. If multi-unit housing is proposed—high-rise or garden-type apartments, town houses, or row houses—it may perhaps be excluded from areas zoned strictly for single-family, detached residences (if such zoning is itself reasonable and in furtherance of some public purpose), but such housing is free to go into other residential districts.⁵ The developer may have to pay for utilities extensions or connections, in accordance with either special assessments or an established fee schedule. Once these generally applicable conditions are met, however, the privately sponsored project may proceed without

⁵ For example, multi-unit housing may be placed in use districts designated R-3 or R-4 under the zoning ordinance of the City of San Jose, as long as it complies with standardized requirements regarding building size, set backs and off street parking.. Zoning Regulations of the City of San Jose, §§9103.3, 9103.4, 9105.8-9105.11, 9106.41 (San Jose's ordinance has been adopted and amended pursuant to its home-rule charter, in the exercise of home-rule powers granted by Cal. Const. Art. XI, §§6, 8, 11. See San Jose Charter, §200. A similar result would be likely under an ordinance adopted pursuant to California's zoning enabling act, Cal. Gov. Code §65800 ff., applicable to non-home rule municipalities, see Cal. Gov. Code §65803.)

any further or *ad hoc* legal clearance. But let an externally identical project—similar design, same location, same compliance with local regulations, codes, and fee schedules⁶—be proposed by a local housing authority for “persons of low income” and the trigger is pulled. Automatically there is required an additional, specific and positive clearance not only by the local governing body but also by the local electorate—acting in utterly discretionary (not to say capricious) fashion ungoverned by any ascertainable standards whatsoever, reasonable or unreasonable.

On the one hand, local voters *are not even called upon to veto* any housing proposals except those designed for persons of low income. On the other hand, local voters *are automatically required* to act, case by case, on exclusion of low-income public housing whenever proposed. A person specifically opposed to entry of low-income persons could not ask for a neater set of loaded dice. In this case, no less than in *Reitman v. Mulkey*,⁷ the challenged state action must be considered in its “historical context” with full regard to the reality of its “ultimate effect.” On such inspection, it appears that Article XXXIV’s positive support for illicit voter prejudice goes well beyond that condemned in *Anderson v. Martin*.⁸ There, minority candidates for public office were at least allowed to share the same ballot with white candidates, though not without having their race called to the voters’ attention. Here, the poor’s housing is required to go on the ballot without reference to other local housing or land use issues, in a

⁶ Local Housing Authorities in California are fully subject to their host municipality’s “planning, zoning, sanitary, and building laws.” Cal. Health & Safety Code §34326. Such Authorities may, moreover, agree to make payments covering the full costs of all “services, improvements, or facilities” furnished by a municipality to or for the benefit of its housing developments. *Id.* §34401. See 42 U.S.C. 1410(i).

⁷ 387 U.S. 369, 373.

⁸ 375 U.S. 399.

scheme of special elections producing only losers—inasmuch as those who are forced to run can win nothing not automatically granted to those who are excused.

The logic of the situation is inexorable: community choice is on a one-way ratchet. *Only* low-income housing is subjected to case-by-case veto; other housing, once it satisfies generally stated, reasonable community standards, is immune (or, implicitly, automatically approved). The record shows that low-income housing *will* be excluded on a significant number of occasions. (A. 34-37). It is thus inevitable under Article XXXIV that, in time, the implicitly perfect record of other, code-complying housing as compared with the (at best) spotty success of code-complying low-income proposals will raise an irresistible inference that low-income proposals are on the whole disfavored because they will house low-income persons. Sooner or later, things are bound to reach a pass at which this court will have to say, as it did in *Whitus v. Georgia*,⁹ that “the opportunity for discrimination was present and we cannot say on this record that it was not resorted to . . .”¹⁰

In this regard, Article XXXIV is precisely analogous to an almost unimaginable statute which would allow an unlimited number of preemptory challenges against black or poor veniremen, while providing that other prospective jurors may be challenged only for cause. Neither the purpose nor the inevitable effect of that scheme would be in doubt, and the Court would not feel it necessary to see the data predictably pile up before condemning it.

⁹ 385 U.S. 545, 552.

¹⁰ This Court has often held that statistical data which are highly suggestive of systematic or deliberate invidious discrimination will shift to the defendant the burden of dispelling the inference of invidious intent—or of justifying the invidiously discriminatory outcome—a burden which can be carried only by showing that the challenged practice is necessary for some other, allowable and important, state purpose. E.g., *Gomillion v. Lightfoot*, 364 U.S. 339; *Coleman v. Alabama*, 389 U.S. 22; *Whitus v. Georgia*, 385 U.S. 545; *Patton v. Mississippi*, 332 U.S. 463; *Norris v. Alabama*, 294 U.S. 587.

II

THE DISCRIMINATION CREATED BY ARTICLE XXXIV'S REQUIREMENT OF A LOCAL REFERENDUM FOR PROPOSED HOUSING, IF BUT ONLY IF IT IS PUBLIC HOUSING FOR THE POOR, IS ARBITRARY, INVIDIOUS, AND LACKING IN ANY RATIONAL BASIS.

To provide that some—but not all—housing proposals may go forward only if specifically and positively approved by local referendum, cannot be rational unless the specially burdened proposals are legitimately a matter of special concern to the community. Why would new housing be a matter of special concern to a community, simply because the housing is sponsored or developed by a local public body, is partially supported by federal funds, and is to be inhabited by persons of low income? The answer indicated by the language of Article XXXIV is that its backers were concerned primarily with the economic status of the people who would occupy public housing rather than with any aspect of the housing itself. The Article applies only to housing for “persons of low income,” defined as “persons or families who lack the amount of income which is necessary . . . to enable them to live in decent, safe and sanitary dwellings, without overcrowding.” Appellant Shaffer shrugs off this plain statement, however, and insists that the voters were really concerned about the physical, sociological and fiscal impact of public housing. We will deal in turn with each of these asserted concerns.

Physical Aspects.

Appellants speak darkly of the “institutional” quality and “mammoth” proportions of public housing. Yet no law of man or nature exempts privately sponsored developments from these sins, or decrees that public housing

must commit them.¹¹ The laws of man, in fact, explicitly incorporate appellant Shaffer's aversion to high-rise design.¹²

Both in California and throughout the nation the great majority of public housing projects now being constructed are not the massive high-rise projects conjured up by appellant Shaffer, but are small groups of townhouses or low-rise apartments that blend inconspicuously into their surrounding neighborhoods. The average public housing project built in California during the 1960-69 period contained 32.2 units as compared to the average project built during 1940-49 which contained 234.6 units.¹³

Moreover, the fact that some public housing authorities were in the past forced to build high-rise projects on inadequate land area is primarily the result of the confinement of public housing to the land-scarce central cities by devices such as Article XXXIV. This pattern is exemplified by the instant case. By preventing the construction of new housing for the poor in two of the fastest growing areas of the state, the City of San Jose and the County of San Mateo, Article XXXIV helps keep the poor from access to

¹¹ "In recent years . . . HUD has attempted, with some notable results, to encourage good design. . . . HUD has recently begun to place careful controls on project size, on use of high rise structures, on design, and has encouraged more flexible management, all in an effort to make future public housing projects more attractive." *A Decent Home*, Report of the President's Committee on Urban Housing 61 (1968). Under the "Turn-key" programs, design, development, and management of "public" housing can all be contracted out by the local housing authority to precisely those private firms which produce and manage housing developments not subject to referendum under Article XXXIV. See *Id.*, at 75-77.

¹² Sec. 207 of the Housing and Urban Development Act of 1968, P.L. 90-448, approved August 1, 1968, 82 Stat. 476, 504, provides that "except in the case of housing predominantly for the elderly, upon enactment of this paragraph, the Secretary shall not approve high-rise elevator projects for families with children unless he makes a determination that there is no practical alternative." 42 U.S.C.A. §1415 (11).

¹³ Department of Housing and Urban Development, Report 8-11A, Consolidated Development Directory, June 30, 1969, pp. 30-46.

the new jobs and services that these areas offer. The practical effect of these restrictions, as the Douglas Commission pointed out, has been to force the construction of the huge central city projects that Appellant Shaffer deplores:

The general tendency in recent years on the part of too many public housing authorities has been to emphasize high-rise and large-scale apartment projects. *This trend has been caused by many factors, notably the refusal of the dwellers in the suburbs and in the outer and middle-class sections of the cities to accept public housing.* This, in turn, has driven public housing closer to the center of the cities where land costs are high. The high cost of land and the continued immigration of low-income families have then led public housing authorities to construct high-rise buildings in order to get as many housing units as possible on each acre of land. . . . *Suburbanites and middle-class residents who criticize the huge projects in the central city and who, at the same time, oppose any projects in their neighborhoods, should realize that their refusal to permit the diffusion of public housing is a major factor in creating the concentration they deplore.*¹⁴

In any case, Article XXXIV's discriminatory feature obviously cannot be justified by appeal to the community's interest in the physical aspects of housing. Evenhanded application of valid zoning and building codes would amply satisfy the undoubted public interest in construction quality, design, location, size, residential density, and allied matters.¹⁵ If in fact Article XXXIV had been designed to control height or massiveness it would have been easy enough to phrase its scope in those terms, defining the housing subject to its provisions using standards such as height, floor area ratio or residential density, all of which are familiar subjects of local regulation. The fact that the scope of the Article was instead defined by reference to the income level of the housing's occupants rather than by the

¹⁴ National Commission on Urban Problems, *Building the American City* 123 (1968) (emphasis added).

¹⁵ Such codes are applicable to public housing. See n. 6, *supra*.

size or density of the housing makes it apparent that the real concern was people, not buildings.

Sociological Impact.

Appellants suggest that public housing is in a class by itself because it is controversial, tends to induce community anxieties, and is thought by many to have an adverse impact on its environment. We must of course look behind such characterizations. Objectively, nothing distinguishes public housing, as such, from physically similar private developments save the certainty that the occupants will have low incomes. Developments need not be concentrated in such masses as to create "ghettoes" in any sense, nor need they be administered in degrading or psychologically detrimental fashion.¹⁶

The programs treated as suspect by Article XXXIV are as amenable to enlightened and sensitive location and administration as are the "leasing," "rent supplement," and "236" programs favored by appellant Shaffer and

¹⁶ "A viable housing project must have access to those facilities which are necessary if a family is to advance economically and socially; jobs for both chief and secondary wage earners; markets and convenience shopping; schools; resources for health and recreation. . . . Second, the design should be such that families can make the dwellings that they occupy their homes, and the project their neighborhood. Only if residents feel this way will they want to spend time and labor taking good care of their dwellings and working for the good character and appearance of the project. If design is to further this objective, it should make as much provision as possible for families to personalize their dwellings inside and out, as if they did, in fact, own them. . . . In order that families may come to feel that the project is their neighborhood, design should be conducive to "neighboring." This means that the arrangements of buildings and the design of space between (or within) buildings should permit the need of like people to form natural, informal groups. . . . They are best served when buildings are arranged in groups or clusters so as to multiply the opportunities for a small number to see each other and get acquainted. Entries, lobbies, corridors and common balconies should not be designed merely as passageways. They should also be designed to serve some of the social needs of people, including the need to neighbor."

U.S. Dept. of Housing and Urban Development, Low Rent Housing Manual, § 221.1, Exhibit 6, pp. 2-3.

exempt from Article XXXIV. To be sure, Californians have a right to insist that the best potential of public housing will always be realized in practice; but they do not have the right to implement that concern through a broad-side discrimination against all public housing when finer-tuned and less onerous alternatives lie ready to hand through enactment at the state or local level of articulate guidelines and standards for housing design that would be applicable to all types of housing.¹⁷

If the concern is truly with the welfare of the residents, the City could impose requirements that the poor be amply represented on housing authority boards, or encourage the use of such innovative devices as the "Turnkey III" program under which public housing occupants can assume the status, responsibilities, and incentives of home buyers and home owners.¹⁸

By ignoring these or similarly focused alternatives, and resorting instead to a wholesale and indiscriminate categorization of all public housing for low-income persons as a matter of extraordinary community sensitivity, California invites the inference that she is pandering to the socioeconomic stereotypes and prejudices of her citizens.¹⁹

Hunter v. Erickson²⁰ teaches that discriminatory use of the referendum cannot be justified as a means of taking the community's temperature, merely to find out the virulence of its prejudice.

Financial Aspects.

Appellants claim that public housing has adverse fiscal impacts on its host community. Even were this true, it provides no rational basis for discriminatory treatment

¹⁷ A good example of such guidelines and standards may be found in the very public-housing proposition defeated by the San Jose voters in 1968, reprinted in the Brief of Appellants James et al., p. 5.

¹⁸ See C. Edson, *Homeownership for Low Income Families*, 3 Monograph Series, National Legal Aid and Defender Assoc. 1, 7-12 (1969).

¹⁹ Cf. *Reitman v. Mulkey*, 387 U.S. 369.

²⁰ 393 U.S. 385.

because public housing is indistinguishable in this regard from numerous other land uses not subject to mandatory referendum.

Taxpayers in communities having public housing may have to make a contribution in the form of property-tax net losses, but only if the statutory payment in lieu of taxes is less than the tax revenues would otherwise have been in the absence of the development of such housing.²¹ But considering how many referendum-proof uses will render land totally immune from local taxation in California, without even an in-lieu payment to lessen the sting, California can hardly be said to have a policy of assuring local electorates a special opportunity to exclude projects whenever and because they threaten to remove land from local tax rolls. Land privately devoted to school,²² Church,²³ museum,²⁴ and hospital²⁵ uses is tax-exempt, but owners are normally free to devote land to such uses—thereby depriving the community of that land's tax potential—without obtaining any specific permission, as long as the land is compatibly zoned. For example, anyone is free to devote to tax-exempt private school uses all land zoned R-1, R-2, R-3, or R-4 under the current zoning ordinance of the City of San Jose.²⁶ Moreover, it is at least doubtful whether a California locality may lawfully exclude such uses from its territory, even by a general revision of its zoning ordi-

²¹ But this is the *only* special "subsidy" which need be exacted from the local fisc. Local housing authorities are empowered by Cal. Gov. Code §34401 to pay for the full costs of municipal services and facilities provided for the benefit of their housing developments. The debts of such authorities "are not a debt of the city, county, state, or any of its political subdivisions," are repayable only from authority revenues (rents plus federal contributions), and therefore are of no concern to local taxpayers. Cal. Health & Safety Code, §§34351, 34353.

²² Cal. Const. Art. XIII, §51a, 1c; Cal. Rev. & Tax Code §§214, 214.5.

²³ Cal. Const. Art. XIII, §51c, 1½; Cal. Rev. & Tax Code §206, 214.

²⁴ Cal. Const. Art. XIII, §1; Cal. Rev. & Tax Code §202.

²⁵ Cal. Const. Art. XIII, §1c; Cal. Rev. & Tax Code §§214, 214.7.

²⁶ Zoning Regulations of the City of San Jose, §§9103.1-9103.4.

nance, if its only reason is to avoid the burden of the tax exemption.²⁷ And it is clear beyond doubt that use of land for public purposes by the state, a county,²⁸ or a school district,²⁹ may not be substantially impeded by the "host" municipality, though land so used be thereby immunized from local taxation.³⁰

It is significant that local housing authorities themselves have repeatedly been characterized by the California Supreme Court as agencies which act on the state's behalf, carrying out responsibilities of statewide concern.³¹ Thus, far from effectuating any general California policy to allow local electorates a veto over the entry of tax-exempt land uses, Article XXXIV actually represents a sharp departure from the established California practice of requiring municipalities to make room for tax-exempt state and state-sponsored activities, whether they like it or not. A general policy to the contrary simply does not exist, and therefore cannot furnish a rational basis for Article XXXIV. Certainly there is no apparent reason (and appellants have offered none) why such a policy should be applied to public housing alone.

In any event, however, Appellant Shaffer has cited no support for the implication (Appellant's Brief, p. 33) that the payments in lieu of taxes made in connection with public housing will be lower than the hypothetical taxes that would have been collected if the housing had not been

²⁷ See California Continuing Education of the Bar, *California Zoning Practice*, §§5.15, 5.40, 8.64, 8.77 (1969).

²⁸ County of Los Angeles v. City of Los Angeles, 212 Cal. App. 2d 160, 28 Cal. Rptr. 32 (1963). See California Continuing Education of the Bar, *supra* n. 27, §8.59.

²⁹ Cal. Gov. Code §§53090-53095. See California Continuing Education of the Bar, *supra*, n. 27, §8.75.

³⁰ Cal. Const. Art. XIII, §1; Cal. Rev. & Tax Code §202.

³¹ Drake v. City of Los Angeles, 38 Cal. 2d 872, 243 P.2d 525 (1952); Housing Authority v. City of Los Angeles, 38 Cal. 2d 853, 243 P.2d 515 (1952); Housing Authority v. Superior Court, 35 Cal.2d 550, 219 P.2d 457 (1950); Kleiber v. City & County of San Francisco, 18 Cal.2d 718, 117 P.2d 657 (1941); Housing Authority v. Dockweiler, 14 Cal.2d 437, 94 P.2d 794 (1939).

tax exempt. In fact, it is impossible to determine what the taxes would have been since public housing is not assessed for tax purposes, and any assumption about what the tax assessment would have been is necessarily based on speculative theory.³² It is a slender reed, indeed, on which to rationalize an avowed discrimination against the poor.

The assumption that in each case public housing has a negative impact on the local tax base may on examination not be intrinsically rational, and it is clearly not rational in relation to other tax-exempt uses that do not make payments in lieu of taxes.

Apart from the tax exemptions appellants also refer to fiscal burdens which public housing may impose on the community through its demand for municipal services. (Appellant's Brief, p. 35). Exactly why public housing should be expected to exert costlier service demands than physically similar, privately developed housing is left unexplained. No doubt there are persons in California who believe that "the poor," as such, tend to make special demands on such public services as law enforcement and sanitation—or on the public schools, perhaps, because "poor people have large families." Giving credence to such invidious stereotypes and speculations, they might choose to subject public housing to special clearance requirements because of the demands it threatens to make on the municipal service budget. Appellants claim no such

³² A variety of appraisal techniques could, in theory, be applied to the situation. It has been pointed out, for example, that if low-rent units were appraised on the basis of capitalized net income after debt service the project might have no taxable value at all. If so, the payments in lieu of taxes would be a net gain to the local fisc even under Appellant's favored theoretical approach. See Fisher, *Twenty Years of Public Housing* 187-89 (1959). Moreover, it has also been forcefully argued that a very different method of calculating the local tax base effect of public housing might be used—how payments in lieu of taxes compare to the taxes collectible were the site to remain undeveloped. Applying this theory can lead to assumptions quite different from Appellant's. See *Id.* 190-193.

justification, however; and reasoning so tainted is in any event constitutionally unacceptable.²³

²³ But assuming, *arguendo*, that the housing for persons of low income would impose some additional cost on local government, there would then be presented the serious question of whether a community may use maximization of local government revenues as a basis for closing its doors to additional residents. The logical extension of such reasoning would be to permit each local community to keep out all new residents and permit only tax-productive industrial or commercial uses, forcing on neighboring communities the burden of providing all residential services. The validity of exclusionary practices that burden the general public interest has been in doubt ever since the question was left open by this Court forty-four years ago in its landmark decision upholding a municipality's right to exclude factories from within its boundaries:

It is said that the village of Euclid is a mere suburb of the city of Cleveland; that the industrial development of that city has now reached and in some degree extended into the village, and in the obvious course of things will soon absorb the entire area for industrial enterprises; that the effect of the ordinance is to divert this natural development elsewhere, with the consequent loss of increased values to the owners of the lands within the village borders. But the village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit, within the limits of the organic law of its creation and the state and federal Constitutions. Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines. If it be a proper exercise of the police power to relegate industrial establishments to localities separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to divert an industrial flow from the course which it would follow, to the injury of the residential public, if left alone, to another course where such injury will be obviated. *It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.*

Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 389-90. (emphasis added). It should also be noted that the Supreme Court of Pennsylvania has recently found that the exclusionary ordinances of municipalities which limit new housing to single family homes on large lots do conflict with the general public interest:

We . . . refuse to allow the township to do precisely what we have never permitted—keep out people, rather than make community

Appellants further argue that Article XXXIV, far from constituting a discrimination against public housing development, merely extends to such development certain "traditional controls" generally applicable to the contracting of public debt in California—controls from which public housing is supposed to have escaped by a freakish twist of judicial interpretation. (Brief of Appellant Shaffer, pp. 18, 34). This argument is specious.

The "traditional controls" are those imposed by Cal. Const. Art. XI, §18, generally forbidding any city, county, or school district to incur indebtedness exceeding one year's income without prior approval by its electorate. As consistently understood by the California courts and legislature, this prohibition has the clearly defined and limited purpose of allowing local taxpayers to protect themselves against official improvidence which might encumber their local unit's general revenue-raising powers.

That is why, as appellant points out, local voters are not required to approve indebtedness incurred for projects, such as highways, to be financed and paid for solely by the state and federal treasuries. It is why the referendum requirement *does* apply when a locality chooses to finance urban renewal projects through its *general-obligation bonds*, but *does not* apply when like projects are financed by redevelopment-agency *revenue bonds*.²⁴ And it is why the California courts have repeatedly adhered to the "special

improvements. . . . [C]ommunities must deal with the problems of population growth. They may not refuse to confront the future by adopting zoning regulations that effectively restrict population to near present levels. It is not for any given township to say who may or may not live within its confines, while disregarding the interests of the entire area. If Concord Township is successful in unnaturally limiting its population growth through the use of exclusive zoning regulations, the people who would normally live there will inevitably have to live in another community, and the requirement that they do so is not a decision that Concord Township should alone be able to make.

Appeal of Kit-Mar Builders, 268 A.2d 765, 768-9 (Pa. 1970).

²⁴ See Cal. Health & Safety Code §§33621, 33630, 33633, 33644; Brief of Appellant Shaffer, pp. 48-49.

fund" doctrine, holding that a municipal bond issue is not "indebtedness or liability" within the purview of Art. XI, §18, if no legal obligation is thereby imposed on the municipality's taxpayers or taxing powers—the bonds being repayable only out of revenues in respect of the project to be financed by their proceeds—leaving the bondholders with no recourse against the general fund or taxing capacity of the issuing municipality.²⁵

By virtue of Cal. Health & Safety Code §§34351, 34353, housing authority bonds partake exactly of the nature of those highway bonds and urban-renewal revenue bonds which, appellant agrees, are clearly beyond the scope of the referendum requirements of Art. XI, §18. Housing authorities may issue only revenue bonds. These are to be repaid from rent receipts and federal contributions and must state expressly that they are not obligations of the state or any political subdivision. Such bonds are, of course, classic examples of the kind of public debt to which California's "traditional controls" have never been deemed applicable. The California Supreme Court, flatly and without hesitation, held in *Housing Authority v. Dockweiler*²⁶ that housing authority bonds were not subject to the referendum requirement of Art. XI, §18, because such bonds, "being payable exclusively from the revenues or property of the project or projects which are constructed with their proceeds and with federal aid, would not constitute a debt within the meaning of the provision." This decision, routinely applying California's long-established special fund doctrine to housing authority revenue bonds, is one of two said by Appellant Shaffer to have created the referendum "loophole" supposedly plugged by Article XXXIV.²⁷

But it is, of course, not the *Dockweiler* holding but Article XXXIV itself which (by in effect excepting housing-

²⁵ *E.g.*, *City of Glendale v. Chapman*, 108 Cal. App.2d 74, 238 P.2d 162 (1952); see *City of Palm Springs v. Ringwald*, 52 Cal. 2d 620, 342 P.2d 898 (1959); *City of Redondo Beach v. Taxpayers*, 54 Cal.2d 126, 352 P.2d 170 (1960).

²⁶ 14 Cal.2d 437, 94 P.2d 794, 806 (1939).

²⁷ See Brief of Appellant Shaffer, p. 18.

authority revenue bonds from the special-fund doctrine) is decidedly untraditional in California jurisprudence.³⁸

Local Self-Government.

Some of the argument advanced by appellants suggests that Article XXXIV might be redeemed by its fostering of local self-government. On a strict view of what is involved in the instant case, this suggestion is not relevant to its disposition. In order to find a constitutionally repugnant discrimination in Article XXXIV, plaintiffs need not compare their situation with that of similarly circumstanced persons in some more enlightened locality. It is enough for them to compare the legal requirements applicable to public housing in San Jose and San Mateo with those applicable to other housing in those same places. The argument here is not that California has generally authorized its cities and counties to decide for themselves how their land should be used, but that California has authorized and required those localities to use a discriminatory device—the mandatory referendum applicable only to public housing—in making those decisions.³⁹ Obviously such a

³⁸ At the statutory level, the California legislature has enacted a Revenue Bond Law, Cal. Gov. Code §54300 et. seq., setting forth a procedure for issuance of municipal revenue bonds which includes a referendum. *Id.*, §54386. However, the Law does not restrict the borrowing powers of any home-rule charter municipality (such as San Jose and most other major California cities) or require such municipality to submit its revenue bonds to referendum, unless that municipality has affirmatively chosen to adopt the Law's provisions. See *City of Redondo Beach v. Taxpayers*, *supra.*, n. 35; *City of Santa Monica v. Grubb*, 245 Cal. App. 2d 718, 54 Cal. Rptr. 210 (1966). The Revenue Bond Law, therefore, does not set forth any general state policy which was "merely extended" to Housing Authority Bonds by Article XXXIV.

³⁹ Amici, nevertheless, doubt whether acceptance of low-income public housing can constitutionally be left to completely unfettered local option—even assuming, contrary to the case here, that it were exercisable only by the governing body. Amici believe that the practice of local option is inextricably bound up with the restriction of the poor's housing choices which occasions the instant attack on Article XXXIV. Accordingly, we discuss the local-option arrangement, and the related justification of local self-government, in Section VI of this brief.

complaint cannot successfully be met with a plea of "local self-government."

Popular Sovereignty and Majority Rule.

Appellants would have it appear that plaintiffs pit themselves unreasonably and paradoxically against the principle of majority rule—or that the court below has invoked the Equal Protection clause in opposition to the "right to vote." Appellants seem to believe—or hope—that you can smuggle any discrimination, no matter how invidious, right past the Equal Protection clause merely by wrapping it in the mantle of a popular vote. But *Hunter v. Erickson*⁴⁰ should have put a stop to that gambit.

A discrimination against public housing is no less a discrimination, and no less arbitrary, because the selectively and irrationally imposed burden consists of mandatory submission to a popular vote. There is no reason why use of the referendum process should be allowed to immunize from judicial inspection a state's arbitrary or invidious imposition of disadvantages. There is every reason why such use should not be allowed. Shall the poll tax be approved if, instead of absolutely excluding from the franchise those who fail to pay, we put the question in each case to the electorate? May prior-residence requirements for welfare applicants be resurrected by submitting to referendum all applications from new arrivals? Is it constitutional to require red-headed lawyers or restaurateurs, but not others, to go to the electorate for their licenses to practice or serve? It seems a sadly perverse employment of the democratic ideal to put it to such service. Appellants' pious incantations of "popular vote" and "majority rule" are but camouflage for the simple, deadly fact that the poor, still once again, are being saddled with a special burden.

Plaintiffs, be it noted, do not argue that there is anything discriminatory about the referendum or popular-vote process itself. They complain rather about the discriminatory imposition of procedural requirements. This can be illus-

⁴⁰ 393 U.S. 385.

trated by a hypothetical example. Suppose a state allowed housing developers to bypass local legislative approval by submitting their projects directly to the voters, but denied the availability of this procedure to developers of housing for persons of low income. Such a procedure would be equally as discriminatory as Article XXXIV, although the discrimination in such a case would consist of the *absence* of a referendum opportunity rather than the *presence* of a referendum requirement.

Conclusion.

We have considered the physical attributes of public housing, its partially tax exempt status, its reliance on public borrowing, its demand for municipal services; and we have dealt with claims of local self-government and popular sovereignty. The inherent fallacy in each facet of Appellant Shaffer's search for rational purpose in Article XXXIV only underscores the real discriminatory purpose which is emblazoned across the face of the Article—the placement of housing for "persons of low income" in a specially disfavored category.

III.

THE DISCRIMINATION WROUGHT BY ARTICLE XXXIV IS ESPECIALLY INVIDIOUS BECAUSE IT EXPLICITLY DISFAVORS THE POOR AND OPERATES TO THE DISADVANTAGE OF MINORITY GROUPS—ALL IN REGARD TO A BASIC NEED.

We have shown that Article XXXIV discriminates against the potential occupants of public housing as compared to occupants of housing of other types, and that there is no rational basis for this distinction. In this Argument III we will demonstrate further that because the discrimination adversely affects the poor and minority groups, and the more so because that discrimination affects a basic need, the discrimination must bear closer judicial scrutiny under the "compelling state interest" test—a scrutiny it cannot survive.

Discrimination against the Poor Requires Exacting Judicial Scrutiny

The case at bar is quite closely analogous to *Hunter v. Erickson*.⁴¹ In *Hunter*, the Court concluded that a special referendum requirement for open occupancy ordinances—measures designed to relieve against race-related disadvantages—was “an explicitly racial classification treating racial housing matters differently from other racial and housing matters,” and was thus a constitutionally disfavored *racial* discrimination, carrying a “‘far heavier burden of justification’ than other classifications.”⁴²

Article XXXIV’s special referendum requirement for housing for “persons of low income”—a program designed to relieve against poverty-related disadvantages—is as explicitly a discrimination against the poor as the law invalidated in *Hunter* was a discrimination against racial minorities. Obviously the persons to be benefitted by low-income housing are by definition poor, and if the housing is not built, it is the poor who suffer.

This Court has often held that discrimination against the poor requires a searching review by the courts. As this Court has stated: “a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, . . . two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny.”⁴³

Article XXXIV Operates to the Disadvantage of Racial Minorities

It is especially appropriate in a case like this one that a discrimination against the poor be regarded as no less invidious or specially suspect than a discrimination against a racial minority. For the fact is that racial minorities

⁴¹ 393 U.S. 385.

⁴² *Id.* at 389, 392.

⁴³ *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 807. See also *Griffin v. Illinois*, 351 U.S. 12; *Douglas v. California*, 372 U.S. 353; and *Harper v. Virginia Board of Elections*, 383 U.S. 663.

constitute a disproportionate share of the persons seeking entrance to publicly-sponsored housing.

As amici will demonstrate in sections V and VI of this brief, the relevant "market" for low-income housing in Santa Clara and San Mateo Counties consists of all of those persons of low income who seek access to the rapidly increasing job opportunities and the educational and environmental amenities of this growing area. This market contains disproportionate numbers of non-whites and minority groups,⁴⁴ and these proportions will continue to increase because of the deplorable housing conditions to which many non-whites have been subjected in the past.

During the decade of the 1950's, when vast numbers of Negroes were migrating to the cities, only 4 million of the 16.8 million new housing units constructed throughout the nation were built in the central cities. These additions were counterbalanced by the loss of 1.5 million central-city units through demolition and other means. The result was that the number of non-whites living in substandard housing increased from 1.4 to 1.8 million, even though the number of substandard units declined.⁴⁵

As a result of this tragic backlog in housing for non-whites it has been estimated that "the nationwide proportionate

⁴⁴ The distribution of families by level of money income in the United States indicates that in 1968 over twice as many non-white families, in proportion to the total non-white population, (44.6%) fell into income ranges (under \$4,999) eligible for low rent public housing than did white families in proportion to the total white population (19.9%). Department of Commerce, Bureau of the Census, *Current Population Reports*, Series P-60, Nos. 53 and 59. The incidence of poverty is more likely to fall on non-white families than white families. In 1968, using the poverty index of the Social Security Administration, over 28% of non-white families in the nation were poverty stricken, compared to only 8% of the white families. Table 33, 1968 HUD Statistical Yearbook, based on preliminary data of Department of Commerce, Bureau of the Census. See also National Commission On Urban Problems, *Building the American City* 45 (1968).

⁴⁵ Report of the National Advisory Commission On Civil Disorders 467 (1968). See also National Commission On Urban Problems, *Building the American City* 79 (1968).

need among nonwhites will be almost three times more acute than among the white majority. In 1978, one in every four non-white families will require some form of housing subsidy, compared to only one in every 12 white families."⁴⁶ This racial imbalance in housing opportunities makes it apparent that any restrictions which discriminate against low-income housing have a severely discriminatory effect on non-whites.

Appellant Shaffer points out that "only 1.4% of households (in Santa Clara County) of an income of \$3,000 or less are Negro,"⁴⁷ but this statistic only demonstrates how few Negroes are able to live in Santa Clara County; for the same census data cited by Appellant Shaffer show that only 0.95% of the "non-poor" in Santa Clara County are Negro. To argue, as Appellant Shaffer does, that because Santa Clara County contains almost no non-whites it is not discriminating against them is as ironic as if the defendants in *Gomillion v. Lightfoot*⁴⁸ had argued that their gerrymandered county was not discriminating against Negroes because it contained no Negroes.

This situation is brought into focus by the President's recent finding that:

"Community opposition to low- and moderate-income housing involves both racial and economic discrimination. Under the Open Housing Act of 1968, it is now illegal to discriminate in the sale or rental of most housing on the basis of race. Strict enforcement of this and similar statutes will help establish an atmosphere in which such discrimination will be the exception rather than the rule. *Nevertheless, the fact remains that it is difficult, if not impossible, in many communities to find sites for low- and moderate-income housing because the occupants will be poor, or will be members of a racial minority, or both. The consequence is that either no low- or moderate-income housing is built or*

⁴⁶ President's Committee on Urban Housing, *A Decent Home* 42 (1968).

⁴⁷ Brief of Appellant Shaffer, p.30.

⁴⁸ 364 U.S. 339.

*that it is built only in the inner city, thus heightening the tendency for racial polarity in our society.*⁴⁹

Housing is a Basic Need

This Court has frequently recognized that adequate housing is a "necessary of life,"⁵⁰ and in recent years, as Mr. Justice Blackmun noted three years ago,⁵¹ the Court has "ruled against and struck down discriminatory housing practices in a number of instances," such as *Shelley v. Kraemer*,⁵² *Reitman v. Mulkey*⁵³ and most recently *Jones v. Alfred H. Mayer Co.*⁵⁴ The result in each of these decisions demonstrates the validity of Mr. Justice Douglas' pronouncement that "Urban Housing is clearly marked with the public interest."⁵⁵

Housing, by determining where one lives, also determines access to jobs, education and recreation. When a case involves such a basic human need, and the discrimination in regard to this need affects both racial minorities and the poor, this Court must be especially careful to sub-

⁴⁹ President's Second Annual Report on National Housing Goals, H.R. Doc. No. 292, 91st Cong. 2d Sess. 42 (1970). (Emphasis supplied.) The National Commission on Urban Problems has observed:

The number of persons of Anglo-Saxon and European stock in the public housing projects, therefore, probably does not exceed two-fifths and might be as low as one-third if the figures were brought up to 1968. While these racial stocks form about half of the elderly, they comprise less than a third of the children. This is merely a quantitative appraisal of the actual facts without the slightest degree of judgment on the relative quality of the occupants. It does help, however, to explain some of the popular opposition to public housing. *Building the American City* 114 (1968).

The Commission also noted that some of the requirements for referendum in situations like the case at bar "are either open or convert means of excluding the poor and Negroes from white middle-class neighborhoods." *Ibid.* 191.

⁵⁰ *Block v. Hirsh*, 256 U.S. 135, 156; *Shapiro v. Thompson*, 394 U.S. 618, 627.

⁵¹ *Jones v. Alfred H. Mayer & Co.*, 379 F.2d 33, 40.

⁵² 334 U.S. 1.

⁵³ 387 U.S. 369.

⁵⁴ 392 U.S. 409.

⁵⁵ *Reitman v. Mulkey*, 387 U.S. 369, 385 (concurring opinion).

ject such discrimination "to the most rigid scrutiny"⁵⁶ in search of some compelling state interest.⁵⁷ But in the instant case we have shown that there is not even a rational basis for the discrimination; it follows of necessity that the discrimination can hardly be required by any compelling state interest.

IV.

ARTICLE XXXIV DISCRIMINATES UNCONSTITUTIONALLY AGAINST THE CLASS OF LOCAL VOTERS WHO FAVOR PUBLIC HOUSING, BY DILUTING AND DEBASING THEIR POLITICAL VOICE.

In addition to infringing plaintiffs' interests in securing decent housing in a preferred location, Article XXXIV also violates their interest in free and equal access to normal political processes of their local communities. In San Jose, for example, the legislative power is entrusted to an elected city council,⁵⁸ and a referendum is required only for general obligation bond issues or for such extraordinary events as a change in the boundaries or form of government of the municipality.⁵⁹ It is thus clear that plaintiffs, and all other San Jose residents for whom public housing production is a dominant political concern, are placed by Article XXXIV at a relative disadvantage vis-a-vis citizens whose main demands on local government lie elsewhere. Those citizens have the opportunity of gaining satisfaction by successful engagement in city council politics. But public housing supporters, even if they have the political strength to hold their own in the council, get nothing unless they can also prevail with the electorate.

The interest in equality of opportunity to have one's preferences counted in political processes has, for reasons

⁵⁶ *Korematsu v. United States*, 323 U.S. 214, 216.

⁵⁷ *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 806-07.

⁵⁸ See San Jose City Charter, as amended through June 2, 1970, Art. IV.

⁵⁹ *Id.*, §1219, 1221, 1700. See W. Crouch, *The Initiative and Referendum in California* 6 (1950). See also n. 39 *supra*.

which no longer need explaining, been accorded extraordinary weight by this Court in litigation under the Equal Protection clause. Systematic discounting of the political roles of identifiable groups—be they defined by race,⁶⁰ place of residence,⁶¹ military status,⁶² wealth,⁶³ property ownership,⁶⁴ or even tax delinquency⁶⁵—has without exception been condemned by this Court. The *Reapportionment Cases* establish that the concerns of equal protection are not so blindly mechanistic as to be content so long as no one is prevented from casting his vote or having it fully counted. They show that it is not simply the total or partial withholding of votes which excites close scrutiny under Equal Protection, but rather any structural bias which systematically discounts the preferences of a legitimately interested group. The applicability of that principle to the very type of bias complained of by plaintiffs here—a selective and discriminatory referendum requirement—is demonstrated by *Hunter v. Erickson*.⁶⁶

In such a case of systematically unequal political opportunity, the Court has made clear that it will demand of the state not only that an interest of compelling magnitude be advanced as justification, but also that the political inequality be as finely tailored to the fulfillment of that interest—as non-onerous a means of achieving it—as the situation will allow.⁶⁷ It is obvious that California cannot even remotely summon up such justifications for Article XXXIV. For, insofar as she professes concern for avoiding undesirable execution of public housing programs, she has available the alternative means such as those set forth at pp. 22-24 of this brief. And insofar as she professes concern for allowing the local population to correct a legislative failure to perceive or abide by overwhelming popular

⁶⁰ *E.g.*, *Nixon v. Herndon*, 273 U.S. 536.

⁶¹ *E.g.*, *Reynolds v. Sims*, 377 U.S. 533.

⁶² *Carrington v. Rash*, 380 U.S. 89.

⁶³ *E.g.*, *Harper v. Virginia Board of Elections*, 383 U.S. 663.

⁶⁴ *E.g.*, *Cipriano v. Houma*, 395 U.S. 701.

⁶⁵ *Harper v. Virginia Board of Elections*, 383 U.S. 663.

⁶⁶ 393 U.S. 385.

⁶⁷ *Kramer v. Union Free School District*, 395 U.S. 621.

sentiment against public housing, evenhanded application to public housing of California's normal type of *voluntary* referendum—which requires *opponents* to bear the onus of initiative and mobilization—will fully satisfy.

Citation of Hunter and Kramer should, indeed, be ample argument to sustain plaintiffs' claim of unconstitutional denial of equal political opportunity at the hands of Article XXXIV. We believe, however, that it may be helpful to the Court if we go on to examine in some detail the argument of Appellant Shaffer that, by objecting to submission of their preferred program to a community-wide vote, plaintiffs are seeking some kind of political preference which would relieve them of the normal burdens of being in a minority.

The creed and practice of democracy in this country have never focused exclusively on an electoral majority as the sole avenue to a measure's acceptance. Doctrine and practice are fully as receptive to the adoption of measures whose positive appeal is chiefly to minorities—but to *various* minorities. In this pluralistic perspective, the sense of the majoritarian limitation is to require that the general course of government shall command the assent of the majority; that the will of the majority shall not be systematically frustrated or subordinated to that of some particular minority; and that no minority faction shall be accorded a position of systematic dominance.⁶⁶ Majority rule—the precept of “one man, one vote”—does not, then, necessarily deprecate responsiveness to minority interests. What it does unquestionably condemn is a process so biased as to yield systematic and unjustified preference (or a subordination) of a particular minority's interest.

This is not to suggest that general responsiveness to minority interests is constitutionally required. No doubt California could, had she so chosen, have followed the model of the traditional New England town, where each

⁶⁶ See, generally, Robert A. Dahl, *A Preface to Democratic Theory*, Ch. 5 (1956).

and every measure must independently win the approval of a majority of the participating electorate in town meeting assembled. But neither California, nor San Mateo, nor San Jose has opted for this model. California has instead, as she was free to do, authorized for her localities a system of general government through popularly elected representatives.⁶⁶ And it is inextricably of the essence of such a system that interest-oriented minorities have the opportunity to push through measures which they strongly favor—even though those measures would not, by themselves, have won support from a majority of the electorate. If the minority who favor some particular measure care strongly enough about it, they have the opportunity to press for majority support from representatives who are either indifferent or tend towards mild opposition—possibly by promising support for measures favored by other minorities, possibly by moral suasion or logical demonstration, possibly by political “pressures.” As regards decisions made in a representative body of limited size, this process is not only workable, but inescapable. But this process is prevented from working in relation to matters which, within an overall system of representative government, have been specially selected out of the regular legislative mill for occasional and isolated decision by the mass of voters.

The net effect of Article XXXIV, then, is that citizens for whom public housing is a high-priority item on the political agenda are deprived of a political opportunity which is generally and normally available to fellow citizens having different interests. For example, a group interested

⁶⁶ The form of government for “general law” cities is set forth in Cal. Gov. Code §§34850 ff., and 36500ff. It vests general legislative power in a popularly elected city council of five members, and allows such variations as a city manager or elected mayor on a local-option basis. In the case of cities, such as San Jose, which have chosen to exercise the “home rule” charter-making powers granted by Cal. Const. Art. XI, §8, the full range of choice has been delegated to the local level. San Jose’s charter establishes a council manager form of government, with general legislative power vested in the popularly elected council.

in nursing homes and actively desiring a zoning change to accommodate that interest may possibly—though it be a clear minority of the local citizenry—accomplish its goal within the local governing body without any need for gaining the positive approval of the electorate.⁷⁰ Likewise for a group actively desiring, say, provision of a new municipal swimming pool. But a like opportunity is denied those whose main political interest at the local level is public housing. Just as in *Hunter v. Erickson*, “passage by the Council suffice(s) (for those who seek, or would benefit from, most ordinances regulating the real property market) unless the electors themselves invoke the general referendum provisions. . . . (Article XXXIV) obviously

⁷⁰ If the change is accomplished by the “administrative” action (“variance” or “exception”) of, e.g., a board of zoning appeals, no referendum is possible. If the change takes the form of “legislative” action (map change or amendment of permitted uses) by the governing body, it is subject to being overruled by a *post facto* referendum, organized at the initiative of the opponents. Cal. Const. Art IV, §1; see California Continuing Education of the Bar, California Zoning Practice §4.4 (1969). This was what was involved in *SASSO v. City of Union City*, 424 F.2d 291 (1970), mistakenly relied upon by appellants here. As this Court explicitly recognized in *Hunter v. Erickson*, *supra*, there is obviously an enormous practical difference between exposure to the risk that opponents of an amendment will bestir themselves successfully to instigate and follow through on a referendum procedure (a risk which is rarely realized), and the certainty which confronts public-housing protagonists that they will have to shoulder precisely that burden in order to get anything, ever. Neither the constitution, statutes, nor San Jose charter appear to insist on such as mandatory, prior-clearance type of referendum for any other type of public or private development. See n. 59, *supra*. If it were true, as suggested by appellants, that Article XXXIV was designed merely to fill a “gap” discovered in California’s referendum policy (see Brief of Appellant Shaffer, pp. 6, 35-36) or to “nullify” the California Supreme Court’s ruling that the normal, voluntary referendum procedure did not reach public housing (Brief of Appellants, p. 4)—the Article would merely have stipulated that decisions to build public housing were subject to being taken to referendum, like other actions of local government, if the opponents were willing and able to shoulder the burden. By so drastically overshooting this easy and obvious mark, Article XXXIV evinces a clear purpose to discriminate against the protagonists of public housing.

(makes) it substantially more difficult to secure enactment of (public housing authorizations)."⁷¹

It defies understanding how such a selective referendum requirement can be said to be "grounded in neutral principle;"⁷² surely this is not what Mr. Justice Harlan meant by that phrase in his concurring opinion in *Hunter v. Erickson*. It is a strange "neutrality," which visits upon members of one sharply defined interest group a special and adverse disparity of treatment—a discrimination—a clear infringement of their fundamental right to have their voices equally heard and their influence equally weighed in whatever standard political processes have been ordained for the politics to which they belong.⁷³

If the historic line of decisions from *Baker*⁷⁴ through *Gray*⁷⁵ and *Reynolds*⁷⁶ to *Kramer*⁷⁷ and *Hadley*⁷⁸ means anything, it means that the manner in which a state's people parcel out the exercise of its sovereignty is a question justiciable under the Fourteenth Amendment—and that, at the very least, once the state has established a general mode of participation by citizens in a governmental process, it may not bias that process in a manner that arbitrarily restricts the opportunities or dilutes the influence of any class of substantially interested citizens. The class composed of supporters of public housing is no

⁷¹ 393 U.S. 385, 390.

⁷² Brief of Appellant Shaffer, pp. 43, 55.

⁷³ The referendum provisions involved in *Ranjel v. City of Lansing*, 417 F.2d 321 (6th Cir. 1969), cert. denied, 397 U.S. 980 (1970); *SASSO v. City of Union City*, 424 F.2d 291 (9th Cir. 1970); and *Spaulding v. Blair*, 403 F.2d 862 (4th Cir. 1968), were on their faces "neutral," for they could be invoked on behalf of the opponents of *any* legislative measure, touching upon *any* interest which citizens might have. We would not agree that this feature is enough in itself to establish the correctness of the decisions in those cases; but it does clearly undercut the reliance placed on them by appellants and distinguish them from the present case, which involves a provision discriminatory on its face.

⁷⁴ *Baker v. Carr*, 369 U.S. 186.

⁷⁵ *Gray v. Sanders*, 372 U.S. 368.

⁷⁶ *Reynolds v. Sims*, 377 U.S. 533.

⁷⁷ *Kramer v. Union Free School District*, 395 U.S. 621.

⁷⁸ *Hadley v. Junior College District*, 397 U.S. 50.

less a discernible and coherent class than those composed of the residents of underrepresented districts in Reynolds, the military residents in Carrington⁷⁹ or the unpropertied citizens in Kramer and Houma.⁸⁰ But by virtue of Article XXXIV, supporters of public housing do not "participate on an equal footing"⁸¹ in the political process with supporters of other interests. The dilution and debasement of their influence is, if anything, more tangible and direct than that which flows from arithmetical malapportionment of representatives.

Contrary to appellants' assertion, the plaintiffs do not seek by this litigation to be assured of influence out of proportion to their "natural" political strength, as determined by numbers or any other relevant factors such as dedication, political skill, or moral force. They do not ask the courts to impose on their behalf any "equal" compromise with "the majority," or in any other way to overlook or relieve against their presumed "minority" situation. Plaintiffs ask, indeed, the very opposite: That the courts remove an unnatural and discriminatory impediment to their marshalling whatever natural political strength they have, and testing it against that of all other contenders for favorable attention *in the regular political forum*.

Thus the plaintiffs' cause flows with the main current of reapportionment and related voting-rights decisions. When this Court declared: "Citizens, not history or economic interests, cast votes,"⁸² it was of course not denying that a citizen values his vote (at least partly) as an instrument for realizing his interests; rather, the Court was explaining why an artificially unequal distribution of representation among citizens could not be justified by a legislative policy of equalizing the representation of interests in disregard of their numerical strength—by counting "land or

⁷⁹ 380 U.S. 89.

⁸⁰ Cipriano v. Houma, 395 U.S. 701.

⁸¹ Hadley, *supra*, at 55.

⁸² Reynolds v. Sims, 377 U.S. 533, 580.

trees or pastures" rather than voters. Plaintiffs here suffer precisely such an artificial dilution (and correlative inflation) of natural strength; and so they have no occasion to seek "equalization" of influence or response in disregard of natural strength. Nor do they, in any sense, seek protection for a "group" interest which is not also and at bottom an interest accruing to each of them as an individual. Each plaintiff, as an individual whose interest in public housing ranks high on his list of political priorities, suffers a restriction of political opportunity in comparison with any other citizen whose attitude towards public housing is one of indifference or opposition.

It is of course true that the foregoing remarks would apply whenever state law restricts or qualifies the power of local governments to act in specified ways or with regard to specified kinds of programs or objectives. The point is simply that the *Reapportionment Cases* and related voting-rights decisions have established beyond question that citizens have a legally protected interest in their access to the normal modes of political participation, at least in the sense that any restrictions or qualifications of that access must, as must other state law, satisfy the standards of equal protection. Whatever classifications such restrictions embody must be justified. With all respect to Appellant Shaffer, this is nothing like insisting that "the equal protection clause forbids a State from requiring voter approval of anything unless it requires voter approval of everything."⁸⁸ It is merely to insist that rules against unjustified classification apply to voter-approval requirements.

This means that if Article XXXIV's express distinction between publicly developed low-income housing and other housing fails to meet the applicable equal protection standard, its discriminatory narrowing of the political opportunities open to citizens favoring public housing in their localities denies those citizens equal protection. And the denial is no less real, and no less a violation of the

⁸⁸ Brief of Appellant Shaffer, p. 57.

Constitution, because the discriminatorily imposed burden consists of submission to a popular vote. It is not the voting procedure itself which is objectionable, but the discriminatory rule for invoking it, as this Court said in *Hunter v. Erickson*: "Even though Akron might have proceeded by majority vote at town meeting on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size. *Cf. Reynolds v. Sims*, 377 U.S. 533. . . ." ⁸⁴

V.

ARTICLE XXXIV UNCONSTITUTIONALLY BURDENS THE BASIC FREEDOM OF ALL PERSONS TO TRAVEL AND MIGRATE THROUGHOUT THE NATION.

In the depression of the 1930's California appeared as a ray of hope to many farmers from the "dust bowl" who had been wiped out by the severe droughts. These "Okies" packed their possessions and set out for the Golden State in search of new opportunities. The existing Californians, disturbed by this development, sought to stem the tide by stationing guards at the border and refusing to allow "indigents" to enter. This Court, in the landmark case of *Edwards v. California*,⁸⁵ held these restrictions unconstitutional.

California subsequently became, not more virtuous, but more subtle. California now excludes or quarantines the poor by severely restricting decent low-income housing through devices like Article XXXIV. But this Court has

⁸⁴ 393 U.S. 385, 392-93.

⁸⁵ 314 U.S. 160.

recently struck down a comparable device—residence requirements for welfare benefits—as an undue restriction on the right to travel,⁸⁶ and the restrictive effects of Article XXXIV are equally as great.

Under present economic conditions subsidized housing is as essential to a poor person's ability to migrate to a state or among localities within it as are welfare benefits. One of every eight families in our country live, like appellees, in pockets of urban and rural poverty;⁸⁷ because they cannot afford decent housing and insufficient public housing exists to accommodate their needs, they must live in overcrowded, run-down, rat- and vermin-infested dwellings. For even this sort of unsafe, unsanitary and demeaning housing, they are required to pay rents that are exorbitant in light of their income, with the result that they are deprived of other necessities, such as clothing.⁸⁸

That the housing crisis for the poor is urgent and continuing has recently been reiterated by still another study group, the President's Task Force on Low Income Housing:

The housing problems of the United States, growing more difficult and more pressing all the time, are not limited to those faced by low-income families. Clearly, however, it is low-income families, and particularly low-income families living in ghetto areas of our cities, whose needs in this respect are greatest and most urgent. The conditions they face have been documented in one commendable research report after another and with the bulk of these findings, and with many of the action proposals based on them, this Task Force is in

⁸⁶ *Shapiro v. Thompson*, 394 U.S. 618.

⁸⁷ President's Committee on Urban Housing, *A Decent Home* 7 (1968): "About 56 percent (4.37 million) of today's 7.8 million house-poor families live in urban areas with 50,000 or more population.

"By 1978, in comparison, about 60 percent (4.5 million) of all families expected to require housing assistance will be urban dwellers. The numbers of urban poor will remain almost a constant, while the number of rural poor will decline."

⁸⁸ See A. 14-20, 62, 104-110.

agreement. Certainly it shares the sense of urgency that earlier reports convey.⁸⁹

Surely this Court needs no additional mass of statistics laid before it to take notice of the nation-wide shortage of housing for the poor.

Shelter costs represent the largest single item in the American family budget. Federal housing policy is intended to lower these costs through measures designed to increase the supply of housing for all income groups, including subsidies to help families defray shelter costs. Thus, homebuyers are allowed to deduct from income taxes interest paid on mortgages and real estate taxes. Veterans too are eligible for additional mortgage assistance; so are millions of other families whose incomes and credit standing qualify them for various kinds of FHA mortgage assistance and insurance programs. Similar assistance extends to persons in rural areas under the Farmers Home Administration.

Finally, at the bottom of the economic ladder are the poor, largely impotent to take advantage of the above subsidies. For families in this class, publicly-sponsored housing represents the major source (and in many places the only source) of decent shelter at a price they can afford to pay, because even the most advanced housing techniques will not allow private industry to meet the housing needs of low-income families without subsidy. "New housing, built by any presently conceivable method, is completely beyond the reach of the poor unless subsidized by the government."⁹⁰

The President has recently commented upon this chronic inability of the private market to supply decent homes for low-income families:

⁸⁹ The President's Task Force on Low Income Housing, *Toward Better Housing for Low Income Families* vii (May, 1970).

⁹⁰ The Report of the President's Committee On Urban Housing, 11. So-called "filter down housing" is either substandard or beyond the price range which the poor can afford to pay. National Commission on Urban Problems, *Building the American City*, pp. 11, 93 (1968).

Housing production has declined sharply in the past year, and over the past four years has been more than one million units short of the volume needed to keep pace with the nation's growing population and replace inevitable losses of dwellings. Insufficient progress has been made in replacing or rehabilitating some six million substandard units. Too many other units continue to be allowed to slip into disrepair.

At the same time, costs of building, owning, or renting decent housing have risen sharply—indeed much faster than the rise in the overall cost of living. Financing costs are up the most, but costs of land, labor and materials are also much inflated. The median price of all conventionally built new homes now being offered for sale is about \$27,000. Nearly half of all American families probably cannot afford to pay much more than \$15,000 for a home, yet today the only significant amounts of new housing available in that price range are mobile homes.⁹¹

It was in recognition of "unsafe and unsanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of low income, in urban, rural nonfarm, and Indian areas, that are injurious to the health, safety, and morals of the citizens of the Nation," that Congress passed the United States Housing Act of 1937 implementing the public housing program.⁹² Of all the federal housing legislation, the public housing program remains the only one which reaches the needs of the poorest members of our society. Other housing programs are designed in fact to begin where public housing leaves off—as a practical matter the maximum income limits for

⁹¹ President's Second Annual Report on National Housing Goals, H.R. Doc. No. 292, 91st Congress, 2d Session, April 2, 1970.

⁹² 42 U.S.C. §1401 (1969). Both the House and Senate Reports on the Housing Act of 1949 also recognize that in many areas private enterprise would be unable to meet low-income housing needs. Report from the Committee on Banking and Currency, House Report #590, 81st Congress, 1st Session, at 43; Senate Supplemental Report, 81st Congress, 1st Session, Report 84 Pt. 2, Calendar #71, at pp. 8-9. A provision for a local finding that private enterprise is unable to meet low-income housing needs has remained a part of the federal housing programs.

public housing become the minimum income limits for participation in other programs, such as the 221(d)(3), 235 and 236 programs.⁹³

Because housing for the poor is in extremely short supply, and because it can only be effectively provided through the federal public housing program, it follows inexorably that by placing restrictions on public housing that are not placed on housing for groups other than the poor, a state can as effectively prevent the in-migration of the poor, as through the use of the blatant prohibitions in *Edwards* or the prior residence requirements in *Shapiro*. Thus Article XXXIV is as serious an incursion upon civil rights as the restrictions struck down by this Court in those cases, and this Court has made it perfectly clear that it will not permit states to substitute indirect discrimination for direct discrimination:

Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.⁹⁴

That the right to migrate freely throughout the country in search of new opportunities is a basic civil right can no longer be disputed. Freedom from arbitrary government restriction of the right to travel if and where one chooses within the country, while not expressly declared in the Constitution, has long been implicit in our form of government.

For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part

⁹³ See National Commission on Urban Problems, *Building the American City* 115, 143-150, 174-176 (1968).

⁹⁴ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 442-43.

of it without interruption, as freely as in our own states.⁹⁵

In its essence the right to travel is one of the most important of all the rights of United States citizens. In *Shapiro v. Thompson* the Court pointed out "that the nature of our federal union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land . . .,"⁹⁶ and that the right to travel has a status equivalent to those rights explicitly protected by the first ten amendments:

"We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision. It suffices that, as MR. JUSTICE STEWART said for the Court in *United States v. Guest*, 383 U.S. 745, 757-758 (1966):

"The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.

"... [T]he right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution." ⁹⁷

⁹⁵ *Taney, C. J.*, in *Passenger Cases*, 7 How. (48 U.S.) 283, 492.

⁹⁶ 394 U.S. 618, 629.

⁹⁷ *Id.* at 630-631. That the right to travel is equivalent to a freedom guaranteed by the Bill of Rights was reiterated by this Court last term in *Dandridge v. Williams*, 397 U.S. 471, 484, where the Court distinguished "state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights," from the regulation in *Shapiro v. Thompson* "where, by contrast, the Court found state interference with the constitutionally protected freedom of interstate travel." Just as the right to travel prevents communities from arbitrarily excluding poor persons, it also prevents a community's forcing poor persons to migrate elsewhere in search of decent housing. *Cf. Western Addition Community Organization v. Weaver*, 294 F. Supp. 433 (N.D. Cal. 1968); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968); Note, *The Interest in Rootedness: Family Relocation and an Approach to Full Indemnity*, 21 Stan. L. Rev. 801 (1969).

Although the term "right to travel" has been used in these cases, the holdings of the cases might better be described as involving a "right to migrate and settle." Obviously the welfare residency requirements there invalidated did not restrict potential recipients from moving through the state but from migrating to and settling permanently in the state, and it is this right to migrate and settle that is as effectively impinged by restrictions on low-income housing as by welfare residency requirements. As the Court said in *Shapiro*, "The purpose of inhibiting migration by needy persons into the State is constitutionally impermissible."⁹⁹

The right to travel does not mean that every community should be forced to build an unlimited supply of public housing to attract as many low-income persons as possible, just as it does not mean that a state must grant unlimited welfare benefits to attract poor people.¹⁰⁰ But when the state adopts a program of social welfare it must be careful that the program is administered both by itself and its subdivisions so as not to intrude upon fundamental constitutional rights. The State of California has granted to local government the right to plan for and regulate all types of land use through zoning, housing, building and subdivision codes. Local governments may use these powers to establish locations for housing and determine its physical characteristics. Using such regulations in a reasonable manner, the State of California and its local governments may control all aspects of housing that are legitimate subjects of government regulation.

But when California supplements these regulations with special *ad hoc* laws designed to impose additional restrictions on public housing for persons of low income, it is clear that the State is seeking to impose indirectly the same restrictions on immigration of indigents that this Court struck down in *Edwards* almost 30 years ago.

⁹⁹ 394 U.S. at 629.

¹⁰⁰ *Shapiro v. Thompson*, 394 U.S. 618.

VI

THE EFFECT OF CALIFORNIA'S REQUIREMENT THAT EACH LOW-INCOME HOUSING PROJECT HAVE LOCAL APPROVAL HAS BEEN TO CONFINE THE POOR AND MINORITY GROUPS TO THEIR EXISTING AREAS OF RESIDENCE IN VIOLATION OF THEIR RIGHT TO EQUAL PROTECTION OF THE LAWS.

We have suggested in Argument V that to subject low-income public housing, and only such housing, to a project-by-project approval procedure is to discriminate invidiously and injuriously on the basis of wealth, thereby obstructing freedom of travel and settlement, without constitutionally acceptable justification. If that suggestion is correct, it applies not only to the *referendum* requirement of Article XXXIV, but also to the other provisions in California's Housing Authorities Law which require ad hoc local governing body approval of public housing.¹⁰⁰ For these latter requirements are no less discriminatory and injurious to the poor than is the former: Developers of housing for the non-poor need merely comply with generally applicable zoning and building laws; only public developers of housing for the poor are automatically required to gain special approval from the local governing body, just as only they need special approval from the electorate.¹⁰¹

Yet Article XXXIV would be unconstitutional if it stood by itself—if the requirement for local governing body approval did not exist. Nor is Article XXXIV any the less unconstitutional, nor any the less ripe for invalidation in the pending cases, because in actuality it is a contributing and compounding cause, rather than the sole cause, of injury. Indeed, plaintiffs in these cases lack specific occasion to attack the requirement for local governing body approval, inasmuch as it appears that such approval would have been forthcoming for the public housing location in

¹⁰⁰ Cal. Health & Safety Code §§34208; 34240; 34313.

¹⁰¹ Cal. Health & Safety Code §34313. See, generally, point I of this brief.

which they are specifically interested.¹⁰² A further reason for dealing with the local approval requirements one step at a time is that the referendum requirement does incorporate one special constitutional vice not shared by that for governing body approval—that is, its effect, as elaborated in Point IV of this brief, of debasing the political roles of public housing supporters. In sum, it seems clear that the present challenge to Article XXXIV can and should be upheld without having to reach the broader issues raised by California's practice of allowing a community's accommodation of public housing to be determined by totally discretionary local option, whether at the level of the governing body or of the electorate.

Even so, amici feel constrained to lay before the Court their beliefs that unfettered local-government option is a key element in the system of state and local laws that have created and are maintaining two societies, separate and unequal, one confined to ghettos, one free to live where it chooses; and that this entire system of keeping the poor in their place (by, among other practices, providing public housing for them there but not elsewhere) violates their right to equal protection of the laws.

The practical effect of the local option restrictions imposed on the public housing program by California can be seen by examining the record of public housing in the San Francisco Bay Area and noting its location. The construction of public housing is confined largely to older urban core areas and black ghettos, while jobs and population growth are rapidly moving out to the suburbs. The table on pp. 55-56 shows that virtually no public housing has been constructed in the primarily white, suburban portions of the Bay Area such as Santa Clara County (in which has no public housing whatsoever been built), San Mateo County (in which one project of 40 units has been built in South San Francisco), and Marin County (in which 363 public housing units have been constructed, 299 of which are

¹⁰² A. 25-27, 122-24.

located in Marin City in the only black ghetto in the county).

The counties in the Bay Area in which substantial amounts of public housing have been built are those containing the older core cities of San Francisco and Oakland, with large non-white and minority group populations: i.e., the City and County of San Francisco with 5,777 public housing units, and Alameda County with 2,401—all of the latter located in Oakland. Contra Costa County has 1,831 units, with 876 located in a black ghetto in the Richmond area immediately north of Oakland, and an additional 312 in Pittsburg, which has a 14% non-white population. The remainder of the Contra Costa County units are scattered in small projects throughout the county, many of them in the farming communities of the eastern portion of the county (Antioch, Brentwood, Oakley).¹⁰³

Public Housing Constructed in San Francisco Bay Area¹⁰⁴

<i>County & City</i>	<i>Population</i>	<i>Non-white Population</i>	<i>Housing Units</i>
<i>San Francisco (City & County)</i>	740,316	135,788 (18%)	5,777
<i>Alameda</i>	912,600	139,023 (15%)	2,401
<i>Oakland</i>	367,548	92,399 (26%)	2,401
<i>Contra Costa</i>	413,200	29,864 (7.2%)	1,831
Antioch	19,170	40 (.2%)	37
Brentwood	6,620	166 (2.5%)	44
Martinez	4,189	17 (.4%)	102
Oakley	4,998	55 (1.1%)	70
Pittsburg	19,062	2,716 (14%)	312
Richmond	71,854	15,353 (21%)	876
Rodeo	6,677	261 (3.9%)	250
San Pablo	23,920	384 (1.6%)	140
<i>Marin</i>	148,800	5,450 (3.7%)	363
Homestead Valley	6,352	94 (1.5%)	28
Marin City	2,519	1,186 (47%)	299
Santa Venetia	4,771	16 (.3%)	36

¹⁰³ Outside of suburban areas a substantial amount of public housing has been built in small rural towns. See Report of the National Commission on Urban Problems, pp. 112-13 (1968). Much of this housing is used to house migrant farm laborers and elderly local residents.

¹⁰⁴ Population figures are drawn from the 1960 census. The statistics on public housing are primarily from U.S. Dept. of Housing and Urban Development, *Low-Rent Project Directory*, Dec. 31, 1969. Updated public housing statistics (to July 15, 1970) were provided by letter of September 15, 1970 from Robert Johnson, Region VI Deputy Assistant Regional Administrator, U.S. Dept. of Housing and Urban Development.

<i>County & City</i>	<i>Population</i>	<i>Non-white Population</i>	<i>Housing Units</i>
<i>San Mateo</i>	449,100	19,216 (4.2%)	40
<i>South San Francisco</i>	39,418	670 (1.7%)	40
<i>Santa Clara</i>	658,700	20,567 (3.2%)	0

If only the units authorized since December 24, 1950, are considered, the same pattern appears.

<i>Jurisdiction</i>	<i>Number of Units Authorized to be Constructed Since Dec. 24, 1950</i>
<i>Benecia</i>	75
<i>Homestead Valley Area</i>	28
<i>Marin City</i>	300
<i>Martinez</i>	50
<i>Northgate Area</i>	40
<i>North Richmond Area</i>	150
<i>Novato</i>	40
<i>Oakland</i>	1,064
<i>Richmond</i>	150
<i>San Francisco</i>	1,610
<i>San Pablo</i>	40
<i>Santa Venetia Area</i>	36

Of the 3,479 total units, 2,674 were built in the older central cities of San Francisco and Oakland.¹⁰⁸

The Kerner Commission warned us that "white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it."¹⁰⁹ The low-income housing program has been one of these institutions. By giving each community a veto power which may be used to prevent the construction of low-income housing within its boundaries, we have permitted the program to be used to reinforce existing patterns of segregation. In communities where minority groups do not now live, local governments continue to exclude them by refusing to permit low-income housing to be built.

Most of the projects have been built in inner city areas. Thus, at a time when increasing numbers of job opportunities are in the suburbs, the poor find that the

¹⁰⁸ U.S. Dept. of Housing and Urban Development, S-11A, Consolidated Development Directory, June 30, 1969, pp. 30-46.

¹⁰⁹ Report of the National Advisory Commission on Civil Disorders, p. 2 (1968).

only housing they can afford, be it public or private, generally is located in the inner-city.¹⁰⁷

Only in the existing ghettos is there political support for low-income housing, so in the ghettos it continues to be built, increasing the already high rate of overcrowding¹⁰⁸ and creating a greater oversupply of applicants for a dwindling number of central city job opportunities. As the Kerner Commission pointed out, "future jobs are being created primarily in the suburbs, but the chronically unemployed population is increasingly concentrated in the ghetto. This separation will make it more and more difficult for Negroes to achieve anything like full employment in decent jobs."¹⁰⁹

The plaintiffs have a constitutionally cognizable interest in freely choosing where they will live. That interest is not, of course, absolutely protected against any and all impediment by state action. It is, however, protected against state interference which discriminates arbitrarily, capriciously, or invidiously. For example, persons may not be fenced out of a particular residential area,¹¹⁰ or a particular city or

¹⁰⁷ Report of the President's Commission on Income Maintenance Programs 132 (1970); see also Alvin L. Shorr, *Slums and Social Insecurity* 110-11 (1963):

"If public housing is the vessel, perhaps Congress is the vintner, but one must ask about the grape and the palate of the taster. The recipe for populating a city of which we have spoken, concentrates Negroes in public housing as in slums. Segregation is not entirely new, of course, but since 1954 it has become a more open insult. To the extent that public housing found its sites chiefly in land cleared for renewal, large areas were devoted exclusively to public housing (St. Louis is an example). To the extent that the growing suburbs successfully resisted public housing, they confined it to the city core. Meanwhile, as between 1935 and 1960, there was a great proportion of Americans who had never experienced poverty personally or were trying to forget it. They contributed to a more critical, if not pious, public view of public housing. Thus, a conjunction of social and economic trends leads to the setting apart of families in public housing."

¹⁰⁸ See National Commission on Urban Problems, *Building the American City* 77-78 (1968).

¹⁰⁹ Report, n. 106 *supra*, p. 406.

¹¹⁰ Cf. *Buchanan v. Warley*, 245 U.S. 60.

county¹¹¹ because of their race; no more may they be fenced out because of low income.¹¹²

Separate neighborhoods are even less equal than separate schools. They deprive minority groups not only of equal educational opportunity but of equal access to jobs.

Appellant Shaffer argues that it is of no concern to this Court how a state divides its power among local governments.¹¹³ But a state may not evade its duty to provide equal protection by abandoning its responsibilities or its decisions to local government. As stated to this Court by former Solicitor-General Archibald Cox:

The fundamental guarantee of equal treatment at the hands of the State cannot be thwarted by the fragmentation of decision making. . . . [T]he constitutional obligation binds the State itself and it cannot be avoided by delegating to others the power to make the discriminatory decision. So long as the State remains involved, no abdication of authority will avail, even when power is transferred to private hands. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725; *Cooper v. Aaron*, 358 U.S. 1, 19. Cf. *Terry v. Adams*, 345 U.S. 461. *A fortiori*, the State cannot insulate itself from responsibility for a decision which results in invidious discrimination by a surrender in favor of its own political subdivisions. That would be like permitting the principal to escape liability by appointing agents. Nor does it matter if the local majority indicates a willingness to forego the benefit of the Equal Protection Clause. 'One's right to life, liberty and property . . . and other fundamental rights may not be submitted to the vote; they depend on the outcome of no elections.' *Board of Education v. Barnette*, 319 U.S. 624, 638, See *Boson v. Rippey*, 285 F.2d 43, 45 (C.A. 5).¹¹⁴

The application of these principles to the case of public housing is illuminated by *Griffin v. County School Board of Prince Edward County*.¹¹⁵ There the State of Virginia

¹¹¹ See *Gomillion v. Lightfoot*, 364 U.S. 339.

¹¹² *Edwards v. California*, 314 U.S. 160.

¹¹³ Brief of Appellant Shaffer, p. 54 et. seq.

¹¹⁴ Brief of the Solicitor General in *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218.

¹¹⁵ 377 U.S. 218.

tried to let its counties decide for themselves whether to operate public schools, or abandon them and substitute a system of private school tuition grants which would have the effect of maintaining segregated schools. This Court held that the state could not thus evade its obligation to provide education in a manner consistent with the equal protection clause:

Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.¹¹⁶

Similarly, territorial discrimination against potential recipients of low-income housing in large areas of California cannot stand unless some rational basis in local conditions can be offered to justify the discrimination, and "grounds of race and opposition to desegregation do not qualify." As this Court stated in *Hunter v. Erickson*:

Likewise, insisting that a State may distribute legislative power as it desires and that the people may retain for themselves the power over certain subjects may generally be true, but these principles furnish no justification for a legislative structure which would otherwise violate the Fourteenth Amendment.¹¹⁷

Appellant Shaffer argues that the presence or absence of low-income housing in various areas of California is merely an unimportant or minor variation which can be safely left up to local whims, like the sale of beer. The states are laboratories of experimentation, she says, whose scientific studies should not be disturbed by judicial meddling.¹¹⁸ But the result of this experiment has become all too clear. "To continue present policies is to make permanent the division of our country into two societies; one, largely Negro and poor, located in the central cities; the other, predominantly white and affluent, located in the suburbs and in outlying

¹¹⁶ 377 U.S. 218 at 231.

¹¹⁷ 393 U.S. 385, 392.

¹¹⁸ Brief of Appellant Shaffer, p. 57.

areas."¹¹⁹ The legitimate desire for state experimentation does not justify experiments in segregation.

We recognize that California has a substantial interest in realizing values of local self-government for their own sake, and that considerable room for variation in many locally determined services and programs can thus be justified. However, as illustrated by Griffin, *supra*, this interest cannot in and of itself justify totally arbitrary differences, among localities in California, with regard to governmental involvement in satisfying a human need as essential as that for decent housing. It is most important to note that California has made not the slightest attempt—either by enacting general standards to govern local decisions concerning public housing or by providing administrative guidance to local units—to ensure that any variations in local receptivity to public housing will reflect even plausible variations in local conditions. On the contrary, California has, by adding the peculiarly intractable form of "local option" required by Article XXXIV, done its best to guaranty that arbitrary and capricious differences in the administration of the program will exist.

However, we need not rely here on our own characterization of housing as a need of such unusual state-wide importance as to make improper a degree of local independence and variation which in other contexts would be unobjectionable. Such a characterization of the public housing program is California's own. The California Supreme Court has repeatedly recognized that the public housing program in California is a state program, in which local municipalities and housing authorities have a purely administrative role. "(T)he city under the Housing Authorities Law is an agency of the state, functioning under state law to fulfill state purposes, and is not acting pursuant to its fundamental law to effect solely municipal objectives. . . . The city and the Housing Authority function as ad-

¹¹⁹ Report of the National Commission On Civil Disorders, p. 22 (1968); President's Second Annual Report on National Housing Goals, n. 50 *supra*.

ministrative arms of the state in pursuing the state concern and effecting the legislative objective." ¹²⁰

But, Appellant Shaffer argues, the policy of local control is consistent with the federal statutes.¹²¹ In answer, we suggest that the United States is not free to embark upon programs in a manner which permits or requires invidious discrimination at the state or local level. "Congress may not authorize the States to violate the Equal Protection Clause."¹²² If a requirement of local approval, applicable to low-income public housing but no other housing, is a denial of equal protection when instigated at the state or local level, it is no less such a denial when instigated by the United States. The United States may not thus absolve state and local governments of their constitutional duties—any more than it might, in the wake of *Shapiro v. Thompson*,¹²³ validly require states to impose one-year "waiting period" regulations as a condition of receiving federal support for public-assistance programs.

This case throws into sharp relief the blatant inequities of a system under which Federal housing subsidies are made available for the poor in California only on the sufferance of local public action while subsidies for those with higher incomes flow unhampered by the need to obtain public approval of the subsidy.

The Federal Housing Administration programs, acting through private mechanisms, have made decent housing a reality for millions of Californians. FHA mortgage insurance has made longer term home mortgages with lower down payments possible for white middle class suburbanites. FHA multifamily mortgage insurance, based on longer term, high ratio loans, has brought rents down in

¹²⁰ *Housing Authority of City of Los Angeles v. City of Los Angeles*, 38 Cal. 2d 853, 243 P.2d, 515, 519 (1952).

¹²¹ Brief of Appellant Shaffer, p. 52.

¹²² *Shapiro v. Thompson*, 394 U.S. 618, 641. See e.g., *Simpkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959, 969 (4th Cir. 1963), cert. denied, 376 U.S. 938. Cf. *Hurd v. Hodge*, 334 U.S. 24, 35-36; *Bolling v. Sharpe*, 347 U.S. 497, 500.

¹²³ 394 U.S. 618.

garden apartments for these same beneficiaries. And Congress has enacted new subsidies, through FHA, for lower middle income or middle income persons.¹²⁴

The central point is that no local approval requirements automatically break or interrupt the transmission belt for Federal housing subsidies or benefits to Californians who are anything but poor. Californians who are not poor accordingly enjoy a continual flow of Federal housing benefits. By the end of 1968, the number of FHA insured mortgages in California equalled 1,491,217, an increase of 319% over the number in 1950. This should be contrasted with the slow growth of the public housing program in the State.¹²⁵

What has been said about California's own assumption of initiative in the public housing field will also make clear why we need not suggest that there is any affirmative legal obligation on California to become involved with public housing in the first place, or even that California must insist that all of its localities keep up with any one of them which might take the lead in providing housing. California has decided for herself to establish a public housing program capable of satisfying a state-perceived need, and it is her obligation not to permit the quiet nullification by local government of a state program established to deal with a

¹²⁴ For a history, description and comparison of U.S. housing subsidies, see Report of the President's Committee on Urban Housing 53ff. (1968). It is interesting to note that Congressional opponents of the rent supplement program, the only FHA subsidy serving beneficiaries in public housing income ranges, have written local approval requirements into Federal law in an effort (largely successful) to cripple the program. *Ibid* 65.

¹²⁵ It is instructive to compare the FHA statistics for New York and California with the comparable figures in those States for public housing as set forth in n. 4 *supra*.

	Dec. 31, 1950	Dec. 31, 1968
FHA insured mortgages in Cal.	467,315	1,491,217
FHA insured mortgages in N.Y.	218,812	695,707

FHA 17th Annual Report (Year Ending Dec. 31, 1950) 31, 73; 1968 HUD Statistical Yearbook 98. Unlike public housing, which grew substantially in New York but not in California after 1950, the FHA programs grew by almost identical rates in each State (California by 319%, New York by 318%).

pressing, dramatic problem confronted by the poor throughout the entire state.

CONCLUSION

We have tried to show how this case fits into the context of the overall low-income housing picture as seen by national and regional organizations deeply concerned over the serious effects of our current housing policies. Pervading both this case and the larger picture is the bitter resistance of large elements of white middle class suburbia to equal housing, employment and education opportunities for members of minority groups.

This depth of antagonism on the part of the white middle class to the poor minorities has continually immobilized our nation's search for a solution to the worsening racial crisis through federal or state legislation. As Dr. Kenneth B. Clark has stated:

I read that report . . . of the 1919 riot in Chicago, and it is as if I were reading the report of the investigating committee on the Harlem riot of '35, the report of the investigating committee on the Harlem riot of '43, the report of the McCone Commission on the Watts riot. I must again in candor say to you members of this Commission—it is a kind of Alice in Wonderland—with the same moving picture re-shown over and over again, the same analysis, the same recommendations, and the same inaction.¹²⁶

By giving Article XXXIV the same exacting scrutiny that it gave to restrictions on equal housing opportunities in *Shelley v. Kraemer*,¹²⁷ *Reitman v. Mulkey*,¹²⁸ and *Jones v. Alfred H. Mayer & Co.*¹²⁹ this Court will assure that the Constitution does not become an ally to this vicious circle of inaction.

¹²⁶ Report of the National Advisory Commission On Civil Disorders, p. 483 (1968).

¹²⁷ 334 U.S. 1.

¹²⁸ 387 U.S. 369.

¹²⁹ 392 U.S. 409.

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October, 1970

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**In the Supreme Court of the
United States**

OCTOBER TERM, 1970

No. 154

RONALD JAMES, *et al.*,
vs. *Appellants,*

ANITA VALTIERRA, *et al.*

No. 226

VIRGINIA C. SHAFFER,
vs. *Appellant,*

ANITA VALTIERRA, *et al.*

On Appeal from the United States District Court
for the Northern District of California

**Opposition of Appellants to Motions of the National
Urban Coalition, *et al.*, and NAACP Legal Defense
and Educational Fund, Inc. *et al.*, for Leave to
File Briefs *Amici Curiae***

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In the Supreme Court of the United States

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Pursuant to Rule 42(3) of the Court's Rules, Ronald James, *et al.*, appellants in No. 154, and Virginia C. Shaffer, appellant in No. 226, object to the motions of The National Urban Coalition, *et al.*, and NAACP Legal Defense and Educational Fund, Inc., *et al.*, for leave to file briefs *amici curiae* herein.

Already on file are a 78-page brief of appellees Valtierra, *et al.*, plaintiffs below, and a 38-page brief of Housing Authority of the City of San Jose, which was a defendant below and, styling itself appellee, seeks affirmance of the judgment against it. The Solicitor General has advised that in a few days he will be filing a brief in support of appellees.

1. Two proposed *amici* briefs are tendered for filing: One on behalf of the National Urban Coalition and 15 other named organizations (hereinafter "Urban Coalition Br."), and the other on behalf of NAACP Legal Defense and Educational Fund, Inc. and National Office for the Rights of the Indigent (hereinafter "Legal Defense Fund Br.").

2. Neither motion complies with Rule 42(3), second sentence. Neither sets forth any "facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties". In fact, neither motion says anything at all about any factual or legal issues relevant to the disposition of the case. The most either says is that movants believe they can place the issues "in a national perspective" (Legal Defense Fund Mo. 4-M; *cf.* Urban Coalition Mo. ii); but what "relevancy to the disposition of the case" (Rule 42(3)) that may have, we are not told. The Urban Coalition Motion violates Rule 42(3) in another way: it fails to "concisely state the nature of the applicant's interest."¹

3. Appellants received no request to consent to *amici* briefs from any of the 15 organizations which now seek to join with the Urban Coalition.² Neither the request of the Urban Coalition nor

1. The caption and text under "The Interest of the Amici" occupy the first eleven pages of the subjoined brief. Had they been placed in the motion, as the Rule requires, it would have exceeded the 5-page limitation in the Rule.

2. The Statement at Urban Coalition Mo. ii that "Petitioners requested consent . . ." is simply incorrect. The request came from Urban Coalition alone, and for it alone. Not until receipt of the motion had we any inkling that any of the 15 others wished to appear in the case. As to this, see ¶ 4, 7, *infra*.

that of the Legal Defense Fund in any way specified what the interest of the applicant was, and the request of the Urban Coalition did not even state what position it proposed to take in this Court. Appellants refused consent, counsel believing that the spirit of Rule 42 (which contemplates extrajudicial disposition of the question of participation by *amici* in the first instance) requires an applicant to disclose both his interest and his position when seeking the consent of parties.

4. We respectfully submit that the purpose of the proposed *amici* briefs is not to aid the Court by the submission of reasoning to reach a proper judgment in the cause, but to impose upon the Court knowledge of the desire of a large number of special interest groups for a particular judgment.* That is not the office of an *amici* brief. Thus Stern & Gressman, Supreme Court Practice (4th ed.), states, p. 482 n.29, quoting from a policy statement of the Solicitor General's office in cases where *amici* seek to be heard,

"... The Department of Justice frowns upon the filing by *amici* with merely an academic interest at one extreme, or those who merely wish to engage in propaganda on the other. Consent is given 'where the applicant has a concrete, substantial interest in the decision of the case, and the proposed brief would assist the Court by presenting relevant arguments or materials which would not otherwise be submitted'."

5. The proposed briefs are simply repetitious of the main Brief of Appellees, which itself extends to 78 pages. The 63-page Urban Coalition Brief adds nothing, except for a 6½ page suggestion (pp. 46-52) that the Article of the California Constitution here assailed (which only provides for a referendum on housing projects) somehow interferes with the right of interstate travel!

*That this is so is shown by the fact that National Urban Coalition actually issued a press release simultaneously with the tendering of its proposed brief in this Court on October 26th. See New York Times, October 27th, 1970, p. 19, col. 2.

That far-fetched argument was not raised by the complaint, in the court below, or by the parties, nor is it involved in any question presented to this Court in Jurisdictional Statements or responses. The 35-page Legal Defense Fund Brief raises no question not thoroughly briefed by appellees, except for a 3-page argument that a referendum that does not speak of race or refer to race is a "badge of slavery"!

6. Appellees have no need for the assistance of the would-be *amici* in the presentation of their case. Appellees are not represented by incompetent counsel, and they are not unable to engage the best and most zealous legal representation. Appellees already have five attorneys of record, *all financed by public or quasi-public funds*³; in addition, the Housing Authority defendants—who seek affirmance of the judgment against them—are represented here by able counsel, a member of the largest private law firm in California. The Solicitor General, who needs no consent from us to file a brief *amicus curiae* (Rule 42(4)), has already indicated his interest and his position in this case by a motion (not served on us) for leave to present oral argument in support of appellees. The Court denied that motion October 19, 1970.

7. The motions for leave to file are out of time. Rule 42(2) provides that, whether filed on consent or on order of the Court, an *amicus* brief must be "presented within the time allowed for the filing of the brief of the party supported." Rule 42(3) provides that when consent of a party is refused, the motion for leave to file must be "timely . . . presented to the court." Plainly these provisions mean that, if consent to the *amicus* brief is refused, the proposed *amicus* must file his motion promptly enough so that the Court may act on it *before* the running of the time of the party

3. Two of counsel for appellees give as their addresses the Law Schools of the University of California and Stanford University. The other three are affiliated with the Legal Aid Societies of San Mateo and Santa Clara Counties, which we understand are financed by OEO money.

supported to file his brief. Here, appellant Shaffer's brief was due, and was filed (without request for extension) on August 13, 1970; near the end of August, we received and refused the request of Urban Coalition (and it alone) for consent to an *amicus* brief. Appellants James *et al.* obtained one extension of time to file their brief; not until that had expired did Legal Defense Fund even ask for consent, which was received September 23rd and refused on or about September 25th. In the face of all this, proposed *amici* do not even present their motions until the very day the briefs of the parties supported—after an extension of time requested and received by them—are due! Even a minimum of diligence would have enabled proposed *amici* to comply comfortably with the time limits plainly expressed in the Rule.

The result of these delays to appellants is that they would be confronted with the necessity of replying to 214 pages of briefs, plus whatever the Solicitor General may file. Reception of the *amici* briefs, we submit, is oppressive to appellants, and aids the Court not at all.

CONCLUSION

For the foregoing reasons, the motions of The National Urban Coalition, et al., and NAACP Legal Defense Fund, *et al.*, for leave to file briefs *amici curiae* should be denied.

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October 28, 1970

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**MOTION OF AMERICAN JEWISH CONGRESS,
AMERICAN JEWISH COMMITTEE AND
AMERICAN CIVIL LIBERTIES UNION
FOR LEAVE TO FILE BRIEF
*AMICI CURIAE***

The undersigned as counsel for the above-named organizations respectfully move this Court for leave to file the accompanying brief *amici curiae*.

The American Jewish Committee was founded in 1907, the American Jewish Congress in 1927. Both organizations are concerned with the preservation of the security and constitutional rights of Jews in America through preservation of the rights of all Americans. Both believe that the welfare of Jews in the United States is inseparably related to the extension of equal opportunity for all, including equal protection of the law for those economically disadvantaged.

The American Civil Liberties Union is a 50-year-old, private non-partisan organization engaged solely in the defense of the Bill of Rights. Its principal interests are freedom of speech and association, due process of law, and the equal protection of the laws.

Discrimination in housing against members of any racial, religious or ethnic group, or against any economically disadvantaged group is, in the view of these organizations, a threat to all groups and to the individual members thereof. Accordingly, the *amici* are deeply concerned with the issues and outcome of these cases.

We believe that this case presents important issues concerning the interpretation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. In challenging the constitutionality of Article XXXIV of the California Constitution which prohibits a state public body from developing, constructing or acquiring a low rent housing project without majority approval of voters at a referendum, the case raises issues concerning the applicability of the Equal Protection Clause to a minority of low income persons.

The accompanying *amici curiae* brief, based upon extensive concern and experience in matters involving dis-

crimination against minorities, is offered in the hope that it will make a significant contribution to the resolution of the issues before the Court.

We have sought the consent of the parties to the filing of a brief *amici curiae*. Counsel for the appellees Valtierra et al. and for the appellee Housing Authority of the City of San Jose granted consent. Counsel for the appellants in each of the appeals withheld consent. Therefore, pursuant to Rule 42 of the Revised Rules of this Court, we move for leave to file our brief *amici curiae*, which is conditionally attached hereto.

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IN THE
Supreme Court of the United States
October Term, 1970

No. 154

RONALD JAMES, *et al.*, *Appellants,*
v.

ANITA VALTIERRA, *et al.*, *Appellees.*

No. 226

VIRGINIA C. SHAFFER, *Appellant,*
v.

ANITA VALTIERRA, *et al.*, *Appellees.*

Appeals from the United States District Court
for the Northern District of California

**BRIEF OF AMERICAN JEWISH CONGRESS,
AMERICAN JEWISH COMMITTEE AND
AMERICAN CIVIL LIBERTIES UNION,
AMICI CURIAE**

This brief is submitted by the undersigned *amici curiae* conditionally upon the granting of the Motion for Leave to File to which it is attached.

Interest of the *Amici*

The interest of the *amici* is set forth in the attached Motion for Leave to File.

Opinion Below

The opinion of the three-judge District Court (App. 168-177) is reported at 313 F. Supp. 1 (N.D. Cal. 1970).

Constitutional Provisions Involved

1. Amendment XIV of the Constitution of the United States provides in pertinent part:

No State shall * * * deny to any person within its jurisdiction the equal protection of the laws.

2. Article XXXIV of the California Constitution provides:

No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until a majority of the qualified electors of the city, town or country, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

For the purpose of this article the term "low rent housing project" shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal

Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. For the purposes of this article only there shall be excluded from the term "low rent housing project" any such project where there shall be in existence on the effective date hereof, a contract for financial assistance between any state public body and the Federal Government in respect to such project.

For the purposes of this article only "persons of low income" shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

Question to Which This Brief Is Addressed

Does Article XXXIV of the California Constitution violate the Equal Protection Clause of the Fourteenth Amendment?

Statement of the Case

Appellees are all "persons of low income" residing in Santa Clara and San Mateo Counties in California. They are predominantly black and Mexican-American. It is undisputed that they now reside in overcrowded, run-down, rat-infested, roach-infested, substandard, unsafe and unsanitary housing. They are required to pay rents that are exorbitant in light of their income and, therefore, are compelled to deprive themselves of other basic needs, such as clothing and adequate food. They are eligible for public housing and, together with more than 2,600 families similarly situated, have been placed on the waiting lists for

low-rent housing of their local authorities. However, they have not been placed in low-rent units because no such units are available. And, unless and until the decision below is affirmed by this Court, the contested requirement of a referendum under Article XXXIV of the California Constitution will stand as a formidable barrier to any such units becoming available. For, despite the clear and compelling need for public housing in Santa Clara and San Mateo Counties, responsible housing authority officials do not now even propose additional units because of the prohibitive costs of referenda and the fear of defeat in the light of experience.

The suit was instituted by appellees Valtierra et al. against the City Council of San Jose and the San Jose Housing Authority. A three-judge District Court granted summary judgment to the plaintiffs and these appeals were taken from that judgment.

Summary of Argument

Article XXXIV of the California Constitution violates the Equal Protection Clause of the Fourteenth Amendment.

A. Under Article XXXIV, low-cost housing projects may not be built unless they are approved by a popular referendum in the affected area. This requirement is not imposed on any other type of public project. Its effect is to reduce the amount of government supported housing that is available to those who need it most.

B. There is an acute shortage of low-rent housing for low-income families in California. This condition has existed for at least a decade.

C. The specifically identifiable victims of the discriminatory provisions of Article XXXIV are the poor. In our society this means primarily Negroes, Mexican-Americans and other minorities. Article XXXIV is therefore vulnerable under the equal protection concept, even though it is not based explicitly on race.

D. Aside from the issue of race, Article XXXIV violates the Equal Protection Clause because it imposes special burdens on the poor.

E. The damage done by the classification made by Article XXXIV, either on the basis of race or on the basis of poverty, is more than sufficient to form the basis of a claim of constitutional injury. There is ample evidence of the destructive effect of ghetto housing on its victims.

F. The classification made by Article XXXIV is unreasonable. The attempted justification thereof by appellants is feeble. Indeed, it is clear that Article XXXIV is specifically designed to enable the residents of an area to veto benefits for a specified group, defined by race, national origin or poverty.

G. Any classification based on race or poverty is presumptively invalid. The poor are a discrete, insular minority who face substantial handicaps in using the political process to redress their grievances.

H. The position we take is not inconsistent with the principle of majority rule. Constitutional limitations such as the Equal Protection Clause are specifically designed to protect minorities against abuse through exercise of the power of majorities.

ARGUMENT

Article XXXIV of the California Constitution violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

A. The Classification Made by Article XXXIV

Article XXXIV of the California Constitution subjects low-cost housing, and low-cost housing alone, to a requirement of approval by popular referendum. Its terms apply only to "living accommodations for persons of low income" financed by the Federal or state government. The class affected is carefully defined to mean those whose income is so low that they need such assistance in order to "live in decent, safe and sanitary dwellings, without overcrowding."

One might have expected that a state that recognizes, in its Constitution, that some of its inhabitants are so poor that they cannot obtain decent housing without governmental assistance would *facilitate* efforts to meet that need, rather than obstruct it. Instead, we find the referendum requirement imposed on low-cost housing—but not on any other governmental benefit. California law imposes no such burden on the approval of any other housing or other project enjoying Federal or state assistance. Massive urban renewal programs leveling whole city blocks, model cities' proposals designed to overhaul whole areas, huge medical centers and university complexes—all these can be launched without a referendum, although the impact on the locality, in terms of added municipal services, increased tax burdens and higher population (or daytime) density may be even greater than for a particular low-rent housing development.

Not even the fact that urban renewal and other projects may disrupt the lives of hundreds of families is viewed as a reason for imposing the referendum hurdle on them. Thus, Congressman Don Edwards, in whose Congressional District the appellees reside, has pointed out that:

San Jose's two urban renewal projects are destroying 681 units of housing for low and very low income families.¹

These families, of course, are given no opportunity to vote on whether the project that affects them so drastically shall be allowed to proceed.

The simple, obvious effect of Article XXXIV is to reduce the amount of government-supported housing that is available to those who need it most. This is not a matter of speculation. The effect of Article XXXIV on low-income housing has been disastrous. New housing units are not even proposed because of the cost of an election and the fear that the proposal will be defeated.² As a result, California lags behind other states in the construction of low-rent units. With 8% of the nation's poor, it has only 4% of the low-income housing units (App. 38). It has constructed 23.4 low-income units per 1,000 low-income family groups, compared with 73.1 per 1,000 in Illinois, 66.7 in New York, 62.6 in Massachusetts, 60.1 in Pennsylvania, 43.2 in Ohio and 36.5 in Texas (App. 38).

1. Edwards, Don, "Housing for Low Income Families in San Jose," a report summarizing a study of low-rent housing in Santa Clara County in December 1969; available from Congressman Edwards' office, p. 18.

2. See affidavits of the Executive Directors for the Housing Authorities of Sacramento, Santa Clara and San Mateo Counties (App. 23-24, 31-33, 122-24).

There is no evidence that a similar discrepancy exists between California and other states with respect to programs not affected by Article XXXIV. In fact, as Congressman Edwards has pointed out:

San Jose has a remarkably high record of success in all of its requests for federal assistance in areas other than housing.³

B. The Shortage of Low-Cost Housing in California

This case arises at a time when the inadequacy of the low-rent housing for low-income families is of critical dimensions in California. When the *Proceedings of the Governor's Conference on Housing*, held in Los Angeles, June 13-15, 1960, were published, the Group Session on Planning reported among other things:⁴

1. Federally aided low-rent dwellings are insufficient for present housing needs. Only 25,500 units have been built in California in almost 25 years.
2. Although state enforcement of agricultural workers' housing standards has been good, this has led to some intercounty movement of structures and the development of "shacktown" settlements in urban areas.
3. Legislative obstacles to public housing in California exist in the referendum requirement of housing authorities and the ban on use of urban renewal project sites for public housing.⁵

3. Report, *supra*, note 1, p. 19.

4. Department of Industrial Relations Division of Housing, San Francisco, California (1960), p. 37.

5. While the emphasis in this brief has been on urban slum ghettos, it should be understood that the need for decent housing for the rural poor, which in California means largely Mexican-Americans, is equally critical. And Article XXXIV by its terms applies to "urban or rural dwellings."

Although more than nine years elapsed between that conference and the initiation of this litigation, the pressing problems identified by that conference, i.e., the housing shortage for low-income families in California, appear to be at least as acute today as they were at that time. This seems especially true of the County of Santa Clara, the county in which the appellees reside.

Its Congressional representative, Don Edwards, commissioned a study of low-rent housing in that county, examining its status during the month of December, 1969.⁶ In summarizing the findings of that study, he concluded (emphasis supplied):

While the 1949 Housing Act authorized 800,000 units of public housing (for families with incomes of \$400 or less per month), to be built in six years in the 50 states, only two-thirds of that six-year total has been built in 20 years. (*None has been built in San Jose or Santa Clara County.*)

Only 30,000 public housing units a year are being built in the United States. Of these, more than half are small apartments for the elderly. Virtually no housing has been built in the ghettos of the United States for poor families—particularly poor Black and Mexican-American families—who need it most. (*None has been built in Santa Clara County or San Jose.*) (pp. 17-18)

. . .

San Jose's remarkable record in receiving grants of federal assistance in areas other than housing is threatened by the city's poor record in low income housing (p. 20).

. . .

The first reason for San Jose being behind in housing for low income and very low income families is that it has failed to take advantage of available federal

6. See Note 1, *supra*.

programs, especially public housing, designed for the poor and very low income families. California's peculiar law requiring a referendum for every project is the key factor. 1,000 units dispersed throughout the city could be under construction today had the voters approved the referendum in November, 1968 (pp. 20-21).

An even more comprehensive study of Santa Clara housing was recently completed by its Planning Department.⁷ Unsurprisingly, it revealed:

The minority groups of the County are concentrated principally in the areas of low income, and are relatively scarce in the high income districts. The largest minority group in Santa Clara County are the Mexican-Americans, who accounted for 9.6 per cent of the population in 1966. Overall, the proportion of minorities in the County has remained at about 15 per cent of the total population.

For the poor and the minorities, housing in the County is limited in quantity and low in quality. While only five per cent of the housing units occupied by non-Mexican-American whites was unsound in 1960, 23 per cent of the units occupied by Mexican-Americans was unsound. Overcrowding was found in 30 per cent of Mexican-American households in 1960, compared to only 6 per cent of non-Mexican-American white households.⁸

* * * The provision of decent, safe, sanitary housing for such households requires public subsidy. Units needed by housing authorities would be in addition to the supply of units otherwise available. It is most probable that present waiting lists of approximately 1,000 households substantially underestimate true needs of housing authorities.⁹

7. County of Santa Clara Planning Department. *The Housing Situation: 1969*.

8. *Id.* at p. ii.

9. *Id.* at p. 29.

But no steps have since been taken to relieve the urgent need for low-cost housing despite the availability of federal financial assistance.

C. The Effect of Article XXXIV on Minorities

The discriminatory effect of Article XXXIV has specific, identifiable victims—those who have insufficient income to get decent uncrowded housing without assistance. In our society, and certainly in California, that means primarily Negroes, Mexican-Americans and other minorities.¹⁰

10. This point was made convincingly with respect to Mexican-Americans in Galarza, Gallegos and Samosa, *Mexican-Americans in the Southwest* (1969), p. 30.

Poverty and minority are synonymous for a large segment of the Mexican-American population. According to the 1960 census there were 243,000 families in the Southwest who were living in poverty commonly described as stark. In these families there were 1,100,000 individuals of whom 530,000 were minors under 18 years of age.

The Mexican-American registers a far greater percentage of the poor than of the total population. * * * In California, where one out of ten residents was of Mexican ancestry, two out of ten of all poor families belonged to this ethnic group.

* * *

Housing problems are particularly severe for persons of low income and for minorities. Low income households compete for a limited number of frequently substandard units composed almost exclusively of used single family and rental housing. The housing problems of non-white and Mexican-Americans result from a combination of both poverty and discrimination, and they have housing choices significantly more limited than those open to white non-Mexican-Americans.

* * *

Mexican-Americans are the largest minority group in Santa Clara County, constituting 9.6 per cent of the 1966 population. From 1960 to 1966 the Mexican-American population increased by at least 17 per cent, compared to the 45 per cent increase in white non-Mexican-Americans in the same period. Black and other non-white populations increased from 3.4 per cent to 4.2 per cent of the population from 1960 to 1966. Since 1960, minorities have remained at about 15 per cent of the County population.

Thus, there can be little doubt about the practical impact of Article XXXIV. It falls largely on the racially disadvantaged. It means that proposals for federally financed housing designed to alleviate the critical housing needs of Blacks and Mexican-Americans must first be submitted to a referendum.

The fact that Article XXXIV is not expressly based on race and does not specifically single out minority groups is not decisive. It is appropriate to ask a simple, blunt question: Whom do we think of when the phrase "low-cost housing for low-income groups" is used? If Article XXXIV had been written expressly to apply only to Blacks and Mexican-Americans, there would be no doubt as to its invalidity. Should the result be any different if the sponsors of Article XXXIV avoided the direct racial classification and yet achieved the same result? We submit that this Court made it clear long ago that, if a law's impact is on minorities, resulting in a special burden, it is constitutionally impermissible. *Yick Wo v. Hopkins*, 118 U. S. 356 (1886).

D. The Effect of Article XXXIV on the Poor

Even if we assume, however, that no discrimination on the basis of race or national origin can be shown, Article XXXIV is vulnerable because it is an untenable discrimination against the poor. Again, this Court has made it clear that a state may not impose special burdens on the poor just because they are poor. *Edwards v. California*, 314 U. S. 160 (1941); *Shapiro v. Thompson*, 394 U. S. 618 (1969); *Griffin v. Illinois*, 351 U. S. 12 (1956). By requiring the poor in California to obtain public approval for

proposals to obtain federal assistance for low-cost housing while not imposing any similar requirement with respect to any other groups' proposal seeking federal assistance (although the impact on the community of other proposals may be even more substantial), California has impermissibly disfavored the poor.

E. The Ghetto Condition

Viewing the classification made by Article XXXIV as based on either race or poverty, the damage it does is more than sufficient to form the basis of a claim of constitutional injury.

It is difficult to characterize adequately the conditions that prevail in urban ghettos. Most ghetto residents suffer inadequate housing, inferior education, unemployment, underemployment, discriminatory consumer and credit practices, poor transportation, sanitation, recreation and other essential municipal services, and a much higher crime rate than other sections of the city. They also are required to tolerate much poorer health services, and much higher sickness and mortality rates.¹¹

Slum ghetto inhabitants have described their own plight:

When they have to get out on the street at 14 or 15 they consider themselves to be a man and are going to take on some responsibility because he is the only man in the house and he has little brothers and sisters going hungry, half starving and trying to get the rent in. It is a bare house, like it is a cold feeling even to be there

11. Report of the National Advisory Commission on Civil Disorders, U. S. Government Printing Office, Washington, D. C. (1968).

and you have to go out on the street and become the subject of the same thing out there. There has to be a breaking point.¹²

A Negro woman in Gary, Indiana, expressed her feelings about her slum ghetto life in this manner:

I mean outside of this district time marches on
 * * * They build better and they have better but you come down here and you see the same thing year after year after year. People struggling, people wanting, people needing, and nobody to give anyone help.¹³

A housewife who lives in the South End of Boston commented graphically on the housing situation in her neighborhood:

A person rents a broken-down room for \$21 to \$24 a week that is rat-infested and has cockroaches running all over the place. There are holes in the ceiling where the plaster has fallen down and the people have to share a bathroom. The so-called furnished apartments usually contain a few chairs, a table and an old rusty bed * * * Frequently, social workers tell families to move out of these homes where the rents are too high, but they never find them decent homes where rents are lower.¹⁴

12. Hearing before the U. S. Commission on Civil Rights, San Francisco, California, May 1-3, 1967, and Oakland, California, May 4-6, 1967, p. 284 (U. S. Government Printing Office, Washington, D. C. (1967)).

13. Proceedings before the Indiana State Advisory Committee to the U. S. Commission on Civil Rights in Gary, Indiana, February 8, 1966, p. 42 (U.S. Government Printing Office, Washington, D. C. (1966)).

14. *The Voice of the Ghetto*. Report on Two Boston Neighborhood Meetings, p. 16 (Mass. State Advisory Committee to the U. S. Commission on Civil Rights, Boston, Massachusetts (1967)).

Article XXXIV closes off an escape route from these conditions, quite possibly the only escape route. Low-cost public housing is the only plan for housing the poor that has received any significant support.

The impact upon the poor of their imprisonment in sub-standard slum ghettos is mirrored in the toxic side effects they constantly confront as the inevitable by-products of their confining environment. Socially, economically, physically, and psychologically, the traumatic effect of that imprisonment describes a wide arc.

The ability of the low-income, minority family member to participate influentially in the political affairs of the community is virtually nil. This, in turn, produces a sense of outrage and a surge of militancy.

Many Negroes have come to believe that they are being exploited politically and economically by the white "power structure." Negroes, like people in poverty everywhere, in fact lack the channels of communication, influence, and appeal that traditionally have been available to ethnic minorities within the city and which enabled them—unburdened by color—to scale the walls of the white ghettos in an earlier era. The frustrations of powerlessness have led some to the conviction that there is no effective alternative to violence as a means of expression and redress, as a way of "moving the system." More generally, the result is alienation and hostility toward the institution of law and government and the white society which controls them. This is reflected in the reach toward racial consciousness and solidarity reflected in the slogan "Black Power."

These facts have combined to inspire a new mood among Negroes, particularly among the young. Self-

esteem and enhanced racial pride are replacing apathy and submission to "the system." Moreover, Negro youth, who make up over half of the ghetto population, share the growing sense of alienation felt by many white youth in our country. Thus, their role in recent civil disorders reflects not only a shared sense of deprivation and victimization by white society but also the rising incidence of disruptive conduct by a segment of American youth throughout the society.¹⁵

Dr. Kenneth B. Clark has described the social and psychological impact of rotting housing:

Housing is no abstract social and political problem, but an extension of a man's personality. If the Negro has to identify with a rat-infested tenement, his sense of personal inadequacy and inferiority, already aggravated by job discrimination and other forms of humiliation, is reinforced by the physical reality around him. If his home is clean and decent and even in some way beautiful, his sense of self is stronger. A house is a concrete symbol of what the person is worth.¹⁶

The experience of the adult in the slum ghetto is, in some predictably melancholy fashion, duplicated in the life of the child in a slum-ghetto isolated school.

Racial isolation in the schools also fosters attitudes and behavior that perpetuate isolation in other important areas of American life. Negro adults who attended racially isolated schools are more likely to have developed attitudes that alienate them from whites. White adults with similarly isolated backgrounds tend

15. Report of the National Advisory Commission on Civil Disorders. U. S. Government Printing Office (March 1, 1968), p. 92.

16. Clark, Kenneth B., *Dark Ghetto*. Harper & Row (1965), p. 11.

to resist desegregation in many areas—housing, jobs and schools.

At the same time, attendance at racially isolated schools tends to reinforce the very attitudes that assign inferior status to Negroes. White adults who attended schools in racial isolation are more apt than other whites to regard Negro institutions as inferior and to resist measures designed to overcome discrimination against Negroes. Negro adults who attended such schools are likely to have lower self-esteem and to accept the assignment of inferior status.¹⁷

Restricted housing also limits employment opportunities. A study recently conducted by the National Committee Against Discrimination in Housing of the nine counties comprising the San Francisco Bay Area (of which San Mateo and Santa Clara were two), describes in detail the inter-relationship between employment trends and housing needs, especially in terms of potential employment opportunities available to the minority (racial and ethnic) labor force in light of the location of their households.¹⁸

The situation in Oakland, Alameda County, California, is illustrative. In 1967, Oakland had a Negro population of 120,000 out of a total of 385,000. The over-all Negro unemployment rate in Oakland during 1967 was 23 percent; for Negro teenagers it was 41 percent. Yet in the suburban areas of Alameda County, where few Negroes live, there were approximately 185,000 jobs at all levels of skill, of which only 3,700 were held by Negroes. Some jobs are

17. Report of the United States Commission on Civil Rights. *Racial Isolation in the Public Schools* (1967), Vol. 1, p. 110.

18. Report yet unpublished, submitted to U. S. Department of Housing and Urban Development on October 30, 1969, pp. 11-12, 14, 24.

always open, but public transportation from Oakland to the outlying areas of Alameda County is limited and costly, and relatively few Negroes in the Oakland slums are able to afford cars.¹⁹

F. The Unreasonableness of the Classification

This Court held in *McGowan v. State of Maryland*, 366 U.S. 420 (1961), a case involving "only economic injury" (366 U.S. at 429), that the Equal Protection Clause "permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others" (at 425). Manifestly, however, this Court did not hold either in *McGowan* or in the cases therein cited that arbitrary classifications are permissible. It is still necessary for the courts to effectuate the mandate of the Equal Protection Clause.

What is involved here is not a mere "economic injury" due to restrictions on the operation of a store but access to "a necessary of life." *Block v. Hirsh*, 256 U.S. 135, 156 (1921). Article XXXIV has the effect of denying, to a specific class, housing to which they are otherwise eligible. The distinction thus made bears no reasonable relationship to any permissible government objective—and certainly not to the objective of assuring decent, uncrowded housing to California citizens. The efforts of appellants to find such a justification are at best feeble.

The "fiscal" and "non-fiscal" considerations which Appellants Shaffer (Brief, pp. 33-37) and James (Brief, pp.

19. Hearing before the U. S. Commission on Civil Rights, San Francisco, California, May 1-3, 1967, and Oakland, California, May 4-6, 1967, pp. 16 and 558 (U. S. Government Printing Office, Washington, D. C. (1967)).

14-15) offer to justify special treatment for federally financed low-cost housing are on their face equally applicable to other forms of proposals requiring Federal financial assistance. Surely, a large urban renewal project, or a new medical center, or a new university create fiscal problems of added police and fire protection, streets, sewers, drains and lighting no less in some instances and more in perhaps others than a particular low-rent housing proposal. Surely, problems relating to city planning, redevelopment and zoning are equally applicable to a host of other projects requiring Federal financial assistance, and are not in any way peculiar to low-cost housing proposals.

It is almost impossible to avoid the conclusion that Article XXXIV has only one purpose; it was designed to enable persons residing in any particular area to veto benefits for a specified group defined by race, national origin or poverty.

It must be remembered that the restraints that are imposed by constitutional principle on state action—legislative, judicial and executive—are inherently inoperative in the case of referenda. No standards can be set to which the electorate must adhere; for example, in deciding which low-rent projects to approve and which to reject. Its decisions may be entirely arbitrary. Most important, no limitation can be imposed to bar action based quite consciously and deliberately on race, poverty or other considerations that may not constitutionally affect state action. There is no way to determine the intent of the electorate or to police its actions. Thus, Article XXXIV is effectively designed to facilitate restriction of housing that might benefit minority families.

**G. The Presumptive Invalidity of Classifications
Based on Race or Poverty**

In any case, we believe, the usual presumption that classifications made by state law are valid is not applicable here. If we are right in our argument above that the distinction drawn by Article XXXIV is based on race and national origin, it is, by that fact alone, a violation of the Equal Protection Clause. As this Court said in *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943):

Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.

Subsequently, in *Korematsu v. United States*, 323 U.S. 214, 216 (1944), this Court said that, "Pressing public necessity may sometimes justify the existence of such distinctions; racial antagonism never can." Here, there is no pretense that Article XXXIV reflects pressing necessity. On the contrary, there is ample reason to conclude that it is founded in, and facilitates the operation of, "racial antagonism."

If one ignores the racial aspect of Article XXXIV, it is still inescapably true that the distinction it draws is, by definition, based on poverty. We submit that such a distinction also is presumptively invalid.

When this Court suggested in its historic footnote 4 in *United States v. Carolene Products Co.*, 304 U.S. 144, 151 (1938) that there may be a "narrow scope" for the presumption of constitutionality when basic rights are involved, it said that "prejudice against discrete and insular

minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." While the "minorities" principally contemplated in *Carolene Products* may well have been racial and religious groups, the decisions cited in support of the propositions were not limited to these groups. (The Court cited, *inter alia*, *McCulloch v. Maryland*, 4 Wheat. 316 (1819), and *South Carolina State Highway Department v. Barnwell Bros.*, 303 U.S. 177 (1938), neither of which involved a racial or religious minority.)

The group here affected is a discrete and insular minority against whom sufficient prejudice exists to curtail the operation of the ordinary political processes for the protection of minorities. The poor are the group in the population least able to gain access to the power structure or to raise the funds needed to wage an effective public campaign—either to oppose such measures as Article XXXIV in the first place or to obtain approval in a referendum of a project from which they would benefit.

It follows that the rights asserted by the appellees here are entitled to that more exacting judicial protection contemplated in *Carolene*. Ordinarily, if a situation exists requiring action by a state, it is for the state to determine the appropriateness of a proposed remedy, and the courts may not interfere unless the state's act is patently unreasonable. But for a measure abridging the rights of a "discrete and insular minority," a more rigorous test is imposed. "The rational connection between the remedy provided and the evil to be curbed, which in other contexts

might support legislation against attack on due process grounds, will not suffice." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). "Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions." *Thornhill v. Alabama*, 310 U.S. 88, 95-96 (1940).

Article XXXIV, we submit, fails to meet the test laid down in these cases.

H. The Limits of Majority Rule

The cases above speak primarily in terms of "legislative" action. Yet, it plainly makes no difference, in applying constitutional restraints on governmental action, that a measure takes the form of a constitutional provision approved by a referendum. *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 736 (1964).

Neither is it significant that the mechanism invoked by Article XXXIV also uses the electoral process. The action of the electorate in an Article XXXIV referendum is "state action," even in the most limited sense of that term. It exercises the full panoply of state power, under a grant of authority from the state. And it makes a decision as to the use of public resources which the Legislative or Executive Branches would otherwise make. In exercising such power, it is subject to the limitations of the Equal Protection Clause.

We reject the suggestion of Appellant Shaffer (Brief, pp. 60-61) that opposition to the referendum process created by Article XXXIV is a "reversal of history" or inherently anti-democratic. The constitutional guarantee of equal protection, like most constitutional guarantees, rests on the assumption that the majority is capable of abusing the minority and that such abuses must be prevented by a law higher than majorities—in legislatures or referenda.

Justice Douglas made this clear in concurring in this Court's decision in *Reitman v. Mulkey*, 387 U.S. 369 (1967) invalidating an amendment to the California Constitution that had been approved by referendum. He said (at 387):

And to those who say that Proposition 14 represents the will of the people of California, one can only reply:

"Wherever the real power in Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents. This is a truth of great importance, but not yet sufficiently attended to * * *"
5 Writings of James Madison 272 (Hunt ed. 1904).

Similarly, Justice White emphasized in *Hunter v. Erickson*, 393 U.S. 385, 392 (1969):

The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed.

Conclusion

We urge this Court to give the Equal Protection Clause an interpretation "adequate to the realities of law's involvement with life,"²⁰ an interpretation that gives weight to the fact that today, at the beginning of the last third of the Twentieth Century, millions of Americans live in sub-standard housing. We urge rejection of the idea that the term, "equal protection," defines what Professor Black has called "a kind of game, in which the object is for the state to see what it can get away with."²¹ Professor Black has put the issue in this way:

When we think of the next hundred years, we have to ask ourselves the question that rises to the solemnity of that lapse of time. Law will envelop and support and shape our society during that century. If at the end of that century, it is still a thing to be told in every traveler's tale that American Negroes are in poverty and misery, if they are still in fact discernibly disadvantaged because of their race, and if during that century the states have maintained legal regimes which did not put forth all reasonably possible affirmative effort to relieve this suffering and practical subordination, are our descendants going to be able to say that the century has been marked by "equal protection of the laws" for Negroes? A hollow and formal "equality," perhaps, if carefully enough defined in categories thereunto devised by the discriminators. But "equal protection"? Will they be able to tell themselves that the state has had no "significant" part in inequalities which have thriven under the regime it maintains and

20. Black, Charles L., Jr., *The Supreme Court 1966 Term, Foreword: "State Action," Equal Protection, and California's Proposition 13*. 81 Harv. L. Rev. 69, 99 (1967).

21. *Ibid.*

guards, and which have enjoyed the immunities mathematically reciprocal to its abstentions! Grounds so "narrow and artificial" may do for the first century of "equal protection." Will they do for the second?²²

For the reasons stated above, we respectfully submit that the decision below should be affirmed.

October, 1970

Respectfully submitted,

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22. *Id.* at p. 98.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 154

RONALD JAMES, *et al.*,
Appellants,
vs.

ANITA VALTIERRA, *et al.*

No. 226

VIRGINIA C. SHAFFER,
Appellant,
vs.

ANITA VALTIERRA, *et al.*

On Appeal from the United States District Court
for the Northern District of California

Opposition of Appellants to Motion of American Jewish Congress, *et al.*, for Leave to File Brief *Amici Curiae*

Pursuant to Rule 42(3) of the Court's Rules, Ronald James, *et al.*, appellants in No. 154, and Virginia C. Shaffer, appellant in No. 226, object to the motion of American Jewish Congress, *et al.*, for leave to file a brief *amici curiae* herein.

On Monday, October 26, 1970, the briefs of appellees were due. On that day we received two motions for leave to file briefs *amici curiae*, those of National Urban Coalition, *et al.* and NAACP

Legal Defense and Educational Fund, Inc., *et al.* Promptly on Wednesday, October 28th, our printed opposition to those motions was served and mailed to the Clerk for filing.

On October 29th, three days after lapse of the time for the filing of appellees' briefs, we received from American Jewish Congress, *et al.* (a) a letter dated October 27th, with a xerox of a type-written *amicus* brief on behalf of American Jewish Congress, American Jewish Committee, and American Civil Liberties Union and motion for leave to file, and (b) a printed brief and motion dated October, 1970.

We object to this latest motion for the same reasons as we objected to the motions of National Urban Coalition, *et al.* and NAACP, *etc., et al.* and for additional reasons, adopt our Opposition dated October 28, 1970, and add the following:

1. The letter requesting our consent to the filing of an *amicus* brief was on behalf of American Jewish Committee and American Jewish Congress. No consent was ever sought for American Civil Liberties Union. Adding it to the brief is not in accord with Rule 42(3).

2. The letter requesting consent did not state the interest of the persons seeking consent or the position they proposed to take in this Court.

3. The request was dated August 7, 1970, and refused by us on August 17, 1970—about 2½ months ago. Yet the applicants did not present their brief to this Court until some days after the briefs of appellees were due and filed. This is not in accord with the provision of Rule 42(2) that "A brief of an *amicus curiae* . . . may be filed *only* . . . within the time allowed for the filing of the brief of the party supported" (emphasis added).

We respectfully submit that the motion of American Jewish Congress, *et al.* should be denied.

Respectfully submitted,

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James, et al.*

MOSES LASKY

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Of Counsel:

MALCOLM T. DUNGAN

October 29, 1970

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Supreme Court, U.S.

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IN THE
Supreme Court of the United States SEAYER, CL

OCTOBER TERM, 1970

No. 154

RONALD JAMES, et al.,

Appellants,

against

ANITA VALTIERRA, et al.,

Appellees.

No. 226

VIRGINIA C. SHAFFER,

Appellant,

against

ANITA VALTIERRA, et al.,

Appellees.

**BRIEF OF THE ATTORNEY GENERAL OF THE STATE
OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF
AFFIRMANCE**

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IN THE
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OCTOBER TERM, 1970

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**BRIEF OF THE ATTORNEY GENERAL OF THE STATE
OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF
AFFIRMANCE**

Interest of the Amicus

New York State has been a pioneer in providing both public housing and subsidized low and moderate income housing for its citizens. The New York State Division of Housing and Community Renewal administers a comprehensive program of financial and technical assistance for

local communities. In its attack upon the related problems of urban blight and inadequate housing, the State of New York provides loans, subsidies and direct grants to municipalities for urban renewal; mortgage loans and technical assistance to nonprofit and private sponsors of middle-income housing and housing for the elderly; loans and subsidies to municipal government and local public housing authorities for slum clearance and low-income public housing; and technical guidance to local government in the formulation of construction standards and in undertaking surveys to determine housing and renewal needs. See *e.g.* McKinney's Unconsolidated Laws of New York, §§ 3501-3524 and New York Private Housing Finance Law.

The State of New York maintains a capital loan fund for public housing which totaled \$960 million as of March 31, 1969. As of that date, over \$940 million was contracted for 140 low-rent projects containing 66,260 apartments, nearly 65,000 apartments had been completed by the end of 1969.* In addition, New York has undertaken a low rent assistance program in which the State leases or, in the instance of cooperative buildings, purchases apartments which are sublet to the poor and elderly.

New York views the outcome of this litigation involving the constitutionality of Article XXXIV of the California Constitution with more than academic interest. If this Court sustains the constitutionality of Article XXXIV, the future of public housing will be in jeopardy throughout the United States. Housing is a fundamental need and it has become increasingly clear that unsubsidized private construction cannot house the less affluent members of society. If California can require the exceptional burden of a referendum before seeking Federal assistance to house the poor, opponents of public housing in other States may be encouraged to create the same obstacle to the future development of low-income housing.

* 1969 *New York Legislative Manual*, p. 497.

The State of New York, by its Attorney General, LOUIS J. LEFKOWITZ, accordingly files this brief as *amicus curiae* in support of affirmance pursuant to Rule 42 of the Rules of this Court.

Question Presented

Does Article XXXIV of the California Constitution violate the Equal Protection Clause of the Fourteenth Amendment in that it invidiously discriminates against the poor, Negroes and other disadvantaged minorities?

ARGUMENT

Article XXXIV of the California Constitution violates the Equal Protection Clause of the Fourteenth Amendment in that it invidiously discriminates against the poor, Negroes and other disadvantaged minorities.

Article XXXIV of the California Constitution provides:

"§ 1. Section 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

For the purposes of this article the term 'low rent housing project' shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. For the purposes of this article only

there shall be excluded from the term 'low rent housing project' any such project where there shall be in existence on the effective date hereof, a contract for financial assistance between any state public body and the Federal Government in respect to such project.

For the purposes of this article only 'persons of low income' shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding."

It should be noted that the referendum requirement of Article XXXIV is not at all a general constitutional limitation on incurring local indebtedness; if that were the case here very different issues would be presented for the Court's consideration. Here, the entire cost of the program is borne by the federal government and the tenants either through Federal loans or by federally guaranteed, tax-free bonds issued for sale by the Housing Authority. 42 U.S.C. § 1401 *et seq.* The city or county may contract with the Authority to accept "payments in lieu of taxes" to meet the cost of municipal services. 42 U.S.C., § 1410(h).

In considering the constitutionality of a governmental classification which has the effect of subjecting a group of persons to differential treatment, it is not enough to determine whether the provision in question applies equally to members of the class defined by the classification; more importantly, it must be determined "whether there is an arbitrary or invidious discrimination between those classes covered * * * and those excluded". *McLaughlin v. Florida*, 379 U. S. 184, 191. Moreover, certain types of classifications which are based on "suspect traits" are subjected to the "most rigid scrutiny" and can be justified only in extraordinary circumstances by state interests of the most compelling kind. See *Korematsu v. United States*, 323 U. S. 214,

216. Classifications based on race are "constitutionally suspect". *Bolling v. Sharpe*, 347 U. S. 497, 499. Classifications based on property are "traditionally disfavored". *Harper v. Virginia Board of Elections*, 383 U. S. 663, 668.

The classification here in question, Article XXXIV of the California Constitution is especially vulnerable to constitutional challenge because it discriminates on the basis of two "suspect" traits—property and race.

A. Article XXXIV imposes a special burden upon the poor which deprives them of equal protection of the law.

Article XXXIV requires that proposed public housing projects, federally financed in whole or in part, for "persons of low-income" must be first submitted to a referendum. It defines "persons of low income" in Section 1 as "persons or families who lack the amount of income which is necessary * * * to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding." The clear effect of Article XXXIV is the imposition of a special burden upon the poor who would benefit from the proposed low-rent public housing. As the three-judge District Court below stated, speaking through Judge Peckham:

"The vice in this case is that Article XXXIV makes it more difficult for state agencies acting on behalf of the poor and the minorities to get federal assistance for housing than for state agencies acting on behalf of other groups to receive federal financial assistance. In California, state agencies may seek federal financial aid, without the burden of first submitting the proposal to referendum, for all projects except low-income housing. Some common examples, *inter alia*, are: highways, urban renewal, hospitals, colleges and universities, secondary schools, law enforcement assistance, and model cities. *Valtierra v. Housing Authority of City of San Jose*, 313 F. Supp. 1, 5."

The classification embodied in Article XXXIV is thus aimed at accomplishing an illegitimate legislative purpose since it seeks to exclude persons on the basis of their poverty. *Edwards v. California*, 314 U. S. 160; *Shapiro v. Thomson*, 394 U. S. 618; *Harper v. Virginia Board of Elections*, *supra*; *Cf. Griffin v. Illinois*, 351 U. S. 12.

Appellants maintain that the poor are not denied equal protection because low-income housing is the only kind of public housing in California and all the poor are treated equally with respect to such housing. But as this Court stated in *McLaughlin v. Florida*, 379 U. S. at 191:

“Judicial inquiry under the Equal Protection Clause, . . . does not end with a showing of equal application among the members of a class. The courts must reach and determine the question . . . whether there is an arbitrary or invidious discrimination between those classes covered and those excluded.”

The class of low-income housing must be compared with all other classes of projects for which state agencies may seek federal financial assistance without the need for a referendum. Urban renewal, colleges, and highways, for example, are projects which may benefit classes other than the poor. Such projects are free of the unique and special burdens imposed by Article XXXIV upon the poor. The poor are thus unconstitutionally deprived of an equal opportunity to secure to themselves the benefits of the federal assistance program which is designed to meet their critical need for housing.

B. Article XXXIV invidiously discriminates against Negroes and other disadvantaged minorities.

In addition to denying equal protection of the law to the poor, Article XXXIV invidiously discriminates against Negroes, Mexican-Americans, and other minorities since here, as in *Hunter v. Erickson*, 393 U. S. 385,

"the reality is that the law's impact falls on the minority." *Hunter v. Erickson, supra*, at 391. In the *Hunter* case this Court struck down an amendment to the Akron, Ohio, City Charter which required a referendum before the enactment of any housing anti-discrimination law, stating:

"Moreover, although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that." 393 U. S. at 391.

The lack of an express racial classification in Article XXXIV does not protect it from constitutional challenge. *Pick Wo v. Hopkins*, 118 U. S. 356; *Reitman v. Mulkey*, 387 U. S. 369, 373; *Gomillion v. Lightfoot*, 364 U. S. 339. The constitutionality of the statute must be examined not only as to its immediate objective, but also in the light of its "historical context" and its "ultimate effect." *Reitman v. Mulkey, Id.*

As was the case of the restrictive covenants struck down in *Shelley v. Kraemer*, 334 U. S. 1, and Art. I Sec. 26 of the California Constitution, recently invalidated in *Reitman v. Mulkey, supra* we have here still another zoning device whereby dominant interests attempt to keep neighborhoods "white". Here as in the *Reitman* case the State of California has provided private persons with the means to act upon their racial prejudices. In doing so, the State has become significantly involved in the private racial discriminations which will undoubtedly result from referenda authorized by Article XXXIV. Justice Douglas, concurring in the *Reitman* case accurately characterized proposition 14 in words equally applicable here:

"Proposition 14 is a form of sophisticated discrimination whereby the people of California harness the

energies of private groups to do indirectly what they cannot under our decisions allow their government to do." 387 U. S. 369, at 383.

To doubt the discriminatory "ultimate effect" of Article XXXIV is to ignore past history and present realities. Widespread use of restrictive covenants played no small part in confining non-whites to certain urban areas and in contributing to general segregated housing patterns.* Real estate brokers and mortgage lenders maintained such patterns. See *Reitman v. Mulkey*, *supra*, Justice Douglas concurring at page 381. It is a present reality that:

"... the right to own or lease property is already denied to many solely because of the pigment of their skin; they are, indeed, under the control of a few who determine where and how the colored people shall live and what the nature of our cities will be." *Id.* at p. 384.

Negroes, even more than poor whites, are burdened by the operation of the classification contained in Article XXXIV since they have the greatest stake in proposed low-income public housing. It is undisputed that persons of low income constitute a larger percentage of the Negro population than they do of the white population. It is also true that due to racially discriminatory attitudes there is a very limited supply of housing available to Negroes with the result that they are most often condemned to live in sub-standard and segregated housing. The President's 1967 Civil Rights Message to Congress noted:

"The result of countless individual acts of discrimination is the spawning of urban ghettos, where housing is inferior, overcrowded and too often overpriced.

* Hearings before the United States Commission on Civil Rights, Los Angeles, San Francisco, January 1960, p. 257.

Statistics tell a part of the story. Throughout the nation, almost twice as many non-whites as whites occupy deteriorating or dilapidated housing. In Watts, 32.5 per cent of all housing is overcrowded, compared with 11.5 per cent for the nation as a whole."

Can it be seriously doubted that the effect of Article XXXIV is to enable the majority to express collectively the same discriminatory attitudes which have contributed to the present plight of Negroes and other disadvantaged minorities?

C. The enjoyment of constitutional rights may not be subjected to the will of an electoral majority.

The fact that California has enabled private persons to express their prejudices in the context of a referendum will not immunize this provision from attack. The right of Negroes to equal protection of the law is a critical personal right; a State may not abridge such rights even through the use of the majoritarian procedure of a referendum. *Lucas v. Colorado General Assembly*, 377 U. S. 713, 736-737. "The sovereignty of the people is itself subject to * * * constitutional limitations * * *." *Hunter v. Erickson*, 390 U. S. 385, 392. As this Court has stated:

"One's right to life, liberty and property * * * and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *West Virginia State Bd. of Education v. Barnette*, 319 U. S. 624, 638.

Ignoring the reality of segregated housing patterns and racial prejudices existing in communities California has in effect entrusted its zoning powers to private persons and groups. Urban housing—especially low-income public housing—is in the public domain and thereby affects the State with great responsibility to insure that the public interest is served in a manner consistent with the

standards of the Equal Protection Clauses of the Fourteenth Amendment. By allowing racial discrimination to be practiced by means of the ballot box with the result that cities are zoned and maintained as white enclaves and black ghettos, California has suffered a governmental responsibility to be exercised by private persons in a manner the State itself may not undertake to act. It is no answer to say that Article XXXIV represents the will of the majority in California, for as one of our founding fathers has stated:

"Wherever the real power in a government lies, there is the danger of oppression. In our governments the real power lies in the majority of the community, and the invasion of private rights is chiefly to be apprehended, not from the acts of government contrary to the sense of its constituents, but from acts in which the government is the mere instrument of the major number of the constituents." 5 Writings of James Madison 272 (Hunt. ed. 1904).

D. Article XXXIV lacks real justifications for the special burdens it imposes upon the poor, Negroes and other disadvantaged minorities.

Combining as it does an express discrimination as to "low-income persons" with a sub-surface disproportionate impact upon racial groups, Article XXXIV must surely be supported by the most substantial and compelling justifications in order to satisfy the constitutional requirements for equal protection. *McLaughlin v. Florida*, 379 U. S. 184 (1964). But no such compelling reasons have been established which justify California's denial to a disadvantaged minority a critically important right—equal opportunity to secure housing.

In an attempt to justify the imposition of inequalities, appellants contend that a gap in California's system of initiative and referendum resulted from a California Su-

preme Court decision which held that acts of a local governing body and housing authority relating to applications to the Federal housing authority were not "legislative" and therefore not reached by the power of referendum. (Brief of Appellants James *et al.* at pp. 13, 14; Brief of Appellant Virginia C. Shaffer at pp. 6, 7.) Therefore, they maintain, the enactment of Article XXXIV was necessary in order to return to the people of California the opportunity to actively participate in the democratic process by reserving to the people control over local matters.

But it is clear that Article 34 has done far more than merely fill in a gap in California's long standing system of initiative and referendum. If that had been the purpose of Article 34, it would have been sufficient to that end to pass a constitutional amendment expressly reserving to the people the rights inherent in the initiative and referendum with respect to decisions of local Housing Authorities to acquire federally funded low-income housing. But here as in *Hunter v. Erickson, supra*, the classification resulting from the amendment is not grounded in any neutral structuring of the internal governmental process. Mr. Justice Harlan concurring in *Hunter* analyzed the issues in terms that are applicable to the instant case:

"In the case before us the city of Akron has not attempted to allocate governmental power on the basis of any general principle. Here we have a provision that has the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interests. * * * The city's principal argument in support of the charter amendment relies on the undisputed fact that fair housing legislation may often be expected to raise the passions of the community to their highest pitch. It was not necessary, however, to pass this amendment in order to assure that particularly sensitive

issues will ultimately be decided by the general electorate. Akron has already provided a procedure, which is grounded in neutral principle, that requires a general referendum on this issue if 10% of the voters insist. If the prospect of fair housing legislation really arouses passionate opposition, the voters will have the final say."

Hunter v. Erickson, supra, at 395.

Instead of placing local Housing Authority decisions in the neutral framework of California's referendum system, on the same plane as other matters presently encompassed within it, housing for the poor is classified separately and unequally. Housing for the poor is the only subject matter required to be submitted to a referendum *before* any decisions can be taken. It is the poor alone who are required to overcome this political obstacle at the *outset*. Decisions affecting publicly owned housing for students and faculty of the University of California or of the State Colleges of California are not subject to the referendum requirements of Article 34, nor is publicly owned housing connected with State hospitals and other institutions. Decisions as to public acquisition, leasing, or destruction of housing are likewise free from the burden imposed by Article 34 on housing for the poor. (See Appendix, pp. 69, 70.)

Appellant Shaffer relies upon three recent Courts of Appeals cases involving state referendum statutes: *Spaulding v. Blair*, 403 F. 2d 862 (4th Cir. 1968); *Ranjel v. City of Housing*, 417 F. 2d 321 (6th Cir. 1969), cert. denied 397 U. S. 980; *Southern Alameda Spanish Speaking Org. v. City of Union City, Cal.*, 424 F. 2d 291 (9th Cir. 1970). Appellant maintains that these cases are illustrations of principles which should be controlling herein (Brief of Appellant Virginia C. Shaffer pp. 58-60).

But each of these cases involved referenda which were part of *neutral, comprehensive* schemes reserving to the electorate the power to repeal or nullify an act *after* its passage if it exercised its option under initiative procedures.

Appellants attempt to make much of supposedly vital fiscal considerations attending any acquisition of federal funds for low-income housing (Brief of Appellant Virginia C. Shaffer, pp. 33-35). But this too rings hollow. Surely local resources must be expended to provide municipal services regardless of whether people are living in sub-standard and deteriorating housing or in decent, sanitary public housing. Indeed, it can be argued with considerable cogency that maintaining the present inadequate housing is likely to involve greater local expenditures for such services as police and fire departments since old and dilapidated buildings are more prone to fire, and overcrowded, sub-standard housing is a contributing factor to civil unrest and crime. Moreover, it should be noted that proposals for projects such as urban renewal also pose fiscal and other problems to localities; yet they need not be first submitted to a referendum.

In sum, no real justification exists in support of the discriminatory classification embodied in Article XXXIV. It is a classification whose *operation* can only serve to perpetuate present patterns of racially segregated housing while encouraging the development of similar patterns in the future. It is a classification whose *express application* imposes special burdens on the poor because of their poverty. In the absence of compelling justification, such an invidious and substantial discrimination on the bases of race and property constitutes a denial of equal protection of the law. *McLaughlin v. Florida, supra*; *Harper v. Virginia State Board of Elections, supra*.

CONCLUSION

For the foregoing reasons, the decision of the Court below that Article XXXIV of the California Constitution is in violation of the Fourteenth Amendment of the United States Constitution should be affirmed.

Dated: New York, N. Y. October 27, 1970.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM 1970

No. 154

RONALD JAMES, ET AL., APPELLANTS

v.

ANITA VALTIERRA, ET AL.

No. 226

VIRGINIA C. SHAFFER, APPELLANT

v.

ANITA VALTIERRA, ET AL.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA**

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The central issue in these cases is whether the equal protection clause of the Fourteenth Amendment is violated by a State's singling out governmental actions relating to the providing of housing for the poor

and subjecting them to a special and burdensome referendum requirement.¹

Article 34 of the California Constitution (set forth in the Appendix, *infra*, pp. 19-20) prohibits the development, construction or acquisition of a low rent housing project by any state public body until such project shall have been approved at a special or general election, by a majority of the qualified electors of the city, town or county in which the proposed project is to be located. The constitutional provision defines a "low rent housing project" as federally or state assisted housing for "persons of low income," who in turn are defined as "persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding."

Article 34 is thus directly applicable to federal programs designed to help provide adequate housing for the poor. These programs reflect a long-standing concern of the United States with problems of housing and poverty. In 1937 Congress declared it to be the policy of the United States to assist the States and their political subdivisions "to remedy the unsafe and

¹ Inasmuch as federal legislation ought not to be construed as purporting to authorize constitutional violations, a State's imposing on a federal program a procedural impediment in violation of the Fourteenth Amendment would also seem to violate the Supremacy Clause. Since we conclude that Article 34 does constitute a denial of equal protection of the laws, we do not and need not consider further appellees' contentions based on the Supremacy Clause. Cf. *Ranjel v. City of Lansing*, 417 F. 2d 321 (C.A. 6), certiorari denied, 397 U.S. 980.

insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income * * * that are injurious to the health, safety, and morals of the citizens of the Nation" (42 U.S.C. 1401). And in 1949 Congress declared the national housing policy to be "a decent home and suitable living environment for every American family" (42 U.S.C. 1441). One of the stated congressional objectives was "the development of well-planned, integrated residential neighborhoods * * *" (42 U.S.C. 1441(3)). In 1968 Congress reaffirmed the goal stated in 1949 and determined that to achieve it the nation needed the construction or rehabilitation of 26 million housing units within a decade, including six million units to serve the needs of low and moderate income persons (see 42 U.S.C. (Supp. V) 1441a).

Among the specific programs Congress has enacted to implement these policies are the provisions of the United States Housing Act of 1937 which authorize the use of federal funds for the construction and operation of public housing projects (42 U.S.C. 1409-1411).² This is the federal program which is directly affected—and impaired—by the referendum requirement of Article 34. While it has been supplemented by other federal programs,³ the public housing program continues to

²The Act's constitutionality was sustained in *Cleveland v. United States*, 323 U.S. 329.

³Several additional federal housing programs are described adequately for purposes of this case in the appellees' brief (Br. p. 7, n. 6, pp. 58-62). And see, generally, 42 U.S.C. 1450 *et seq.* (urban renewal); 42 U.S.C. (Supp. V) 3301 *et seq.* (model cities). As appellees point out, these additional programs supplement, rather than supplant, the public housing program, and in some instances serve a substantially different type of persons.

play an important role in the government's efforts to achieve the congressional housing objectives.⁴ The present case is, accordingly, of significant interest to the United States.

1. In 1938, California provided for implementation in that State of the Federal Housing Act of 1937 by enacting the Housing Authorities Law, Calif. Health and Safety Code § 34200, *et seq.*, enabling local governing bodies to obtain the benefits of the federal legislation by declaring a need for low-income housing and establishing housing authorities.⁵ Pursuant to the federal statute, as amended (42 U.S.C. (Supp. V) 1415 (7)), local governing bodies must approve applications, proposed by the housing authorities, for federal assistance.

In 1950, the Supreme Court of California held that these two decisions committed to local governing bodies were administrative in nature and, hence, unlike legislative enactments, not subject to review by post-referendum. *Housing Authority v. Superior Court*, 35 Cal.2d 550, 219 P.2d 457; see, also, *Kleiber v. San Francisco*, 18 Cal.2d 718, 117 P.2d 657. Subsequently in that same year, the state constitution was amended by referendum to include Article 34, prohibiting construction or acquisition of low-income

⁴ Statistics compiled by the Department of Housing and Urban Development show that on June 30, 1969, 2.5 million persons, including 1.5 million minors, lived in 784,580 public housing dwellings in 3,369 localities; and on June 30, 1970, 2.8 million persons, including 1.6 million minors, lived in 866,007 public housing dwellings in 3,972 localities. During 1969 alone, local housing authorities applied for 253,650 additional public housing dwelling units.

⁵ The constitutionality of the state Act was sustained in *Housing Authority v. Dockweiler*, 14 Cal. 2d 437, 94 P.2d 794.

housing developments without *prior* referendum approval.

In 1966, the city council of San Jose, one member dissenting, declared a need for low-income housing and established a city housing authority (A. 25-27). In 1968, the council adopted, with one member dissenting, a measure to enable the housing authority to develop or acquire a low-rent housing project (A. 28-29) and a resolution placing that measure on the ballot (A. 28-30). The proposal was defeated (A. 10, 39, 64).

The present class action was initiated in August 1969 against the city council and housing authority^{*} by residents of San Jose who were eligible for but unable to obtain adequate low-income housing (A. 1-13). Plaintiffs sought a declaratory judgment that Article 34 was unconstitutional and an order enjoining defendants from enforcing or complying with its requirements. This action was consolidated with a similar action against the housing authority of San Mateo,⁷ and, after discovery and stipulations, a three-judge district court granted summary judgment for the plaintiffs. Two appeals have been taken from that decision: one by the city council of San Jose (No. 154) and a second by a single member of the council (No. 226) on the ground that the city council "appealed in order to obtain this Court's approval of the

^{*} Federal officials were among the defendants originally named in the complaint (A. 1, 6), but the suit was dismissed as to them because no relief was sought against them (A. 171).

⁷ The housing authority in the San Mateo case declined to defend.

judgment." Brief of Appellant Shaffer at 17. Neither housing authority has appealed.

This Court noted probable jurisdiction in No. 154 on June 8, 1970 (398 U.S. 949), and in No. 226 on June 29, 1970 (399 U.S. 925).

2. In our view, the constitutional question presented in these cases, while important, is a narrow one. There is no claim here of a constitutional right, in the abstract, to adequate housing for the poor, or to public housing. The claim is, instead, that, in singling out governmental actions relating to the providing of housing for the poor and subjecting them to a special and burdensome referendum requirement, Article 34 is invidiously discriminatory.* We believe the district court correctly viewed that issue as governed by the principles established by this Court's decision in *Hunter v. Erickson*, 393 U.S. 385, and, therefore, correctly upheld the appellees' constitutional claim.

(a) In *Hunter* a city council had authority to enact ordinances pertaining to, among other matters, real estate transactions within the municipality; such ordinances would ordinarily become effective 30 days after enactment and could be repealed only by the

* California imposes no comparable *mandatory, prior* referendum requirement for authorization of legislation or administrative action relating to other expenditures of public funds or other governmental decisions concerning land use. Such a requirement is manifestly a more substantial hurdle to governmental action than is the generally applicable provision of Article 4, § 1 of the California Constitution for referenda to review legislation, after its enactment, upon the petition of a sufficient number of voters. See, also, California Const., Art. 13 (Cum. Pocket Part) § 40 (requiring a prior referendum for assumption of long-term indebtedness under a general-obligation bond).

council or by a majority of voters participating in a properly initiated referendum. 393 U.S. at 386, 390 & n. 6. By an amendment to the city charter adopted in a popular referendum, the council was divested of that authority with respect to one type of regulation: ordinances regulating real estate transactions "on the basis of race, color, religion, national origin or ancestry." *Id.* at 387. No such ordinance would become effective (and previously enacted ordinances would cease to be effective) until approved by a majority of the electors voting on the question at a regular or general election. *Ibid.* A class action to compel enforcement of a suspended fair-housing ordinance by the agency established for that purpose was initiated by a Negro who, because of race, had been denied an opportunity to purchase a home. On appeal from a decision of the highest court of the State upholding the constitutionality of the charter amendment, this Court reversed.

The discrimination wrought by the charter amendment had two dimensions: first, the amendment "drew a distinction between those groups who sought the law's protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends," 393 U.S. at 390; and, second, "although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority," for it was they who were in need of protective legislation, *id.* at 391.

In assessing whether this distinction was nevertheless justifiable, the Court first looked to the real interest at stake of those who had been disadvantaged—the need to obtain access to decent housing (398 U.S. at 391):

The preamble to the open housing ordinance which was suspended by § 137 recited that the population of Akron consists of “people of different race, color, religion, ancestry or national origin, many of whom live in circumscribed and segregated areas, under sub-standard, unhealthful, unsafe, unsanitary and overcrowded conditions, because of discrimination in the sale, lease, rental and financing of housing.” Such was the situation in Akron. It is against this background that the referendum required by § 137 must be assessed.

Applying the test announced in *McLaughlin v. Florida*, 379 U.S. 184, 194, pertaining to official distinctions based on race, the Court held that the discrimination was not justified:

We are unimpressed with any of Akron's justifications for its discrimination. Characterizing it simply as a public decision to move slowly in the delicate area of race relations emphasizes the impact and burden of § 137, but does not justify it. The amendment was unnecessary either to implement a decision to go slowly, or to allow the people of Akron to participate in that decision. Likewise, insisting that a State may distribute legislative power as it desires and that the people may retain for themselves the power over certain subjects may

generally be true, but these principles furnish no justification for a legislative structure which otherwise would violate the Fourteenth Amendment. Nor does the implementation of this change through popular referendum immunize it. * * *

393 U.S. at 392 (footnote omitted). Accordingly, the referendum requirement, which placed "special burdens on racial minorities within the governmental process," *id.* at 391, and disadvantaged a "particular group by making it more difficult to enact legislation in its behalf," *id.* at 393, was held to constitute a denial of equal protection of the laws.

(b) For the reasons which follow, we believe the rationale of *Hunter* is, as the court below held, at least equally applicable to the present case.

(1) In the manner in which it is discriminatory, Article 34 of the California Constitution is virtually identical to the city charter amendment in *Hunter*. It singles out one kind of official decision committed by law to designated government agencies for a requirement of prior referendum approval:

No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

(2) The appellees' interest at stake here* is also the same as in *Hunter*; namely, the need to obtain decent housing.¹⁰ In *Hunter*, that interest, constituting the background against which the referendum re-

* While affirmance of the decision below will not ensure that the individual plaintiffs will actually obtain adequate housing, this consideration does not, as appellant Shaffer contends (Br. at 25-27), defeat the plaintiffs' standing. In neither *Hunter*, *Reitman v. Mulkey*, 387 U.S. 369, nor *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 641-642, among other cases, could individual members of the disadvantaged group demonstrate that their position would in fact be ultimately improved by removal of the challenged restrictions.

¹⁰ To be sure, the burden on those who seek "the law's protection" is somewhat different here than in *Hunter* where the burden was placed within the legislative process, "making it more difficult [for a particular group] to enact legislation in its behalf." 393 U.S. at 390, 393. In the present case, plaintiffs seek to have federal and state legislation—already enacted—carried out by those agencies properly authorized to do so, without the unique burden of an automatic, prior-approval referendum requirement. Just as this Court's citation in *Hunter* (393 U.S. at 391) of *Gomillion v. Lightfoot*, 364 U.S. 339, *Reynolds v. Sims*, 377 U.S. 533, and *Avery v. Midland County*, 390 U.S. 474, suggests that the principles of those cases forbidding various "forms of imbalance in the electoral processes apply, *a fortiori*, when what is at stake is the end product to which these are preliminary and preparatory steps—i.e., the very enactment of legislation" (Brief for the United States as Amicus Curiae at 15, *Hunter v. Erikson*, No. 63, O.T., 1968), so too *Hunter* would seem to apply *a fortiori* when what is in issue is whether duly constituted state agencies may exercise their authority under legislation already duly enacted. Indeed, a previously enacted fair-housing ordinance, which had been rendered ineffective by the charter amendment, 393 U.S. at 386-387, was reinstated by this Court's decision in *Hunter*; and, just as is sought here, the administrative machinery established to carry it out, *id.* at 386, was permitted to do so without prior referendum approval.

quirement could be appropriately assessed, was set forth in findings by the city council. Here similar legislative findings have been separately made by the federal, state, and local governments.

Congressional findings on the need for decent housing underlie a federal policy of long standing. In 1937 Congress found a need "to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income * * * that are injurious to the health, safety, and morals of the citizens of the Nation."

42 U.S.C. 1401. In 1948 Congress declared that

the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation. * * *

42 U.S.C. 1441. That need and goal were reaffirmed by Congress in 1968. 42 U.S.C. (Supp. V) 1441a.

The California legislature has made similar findings and a declaration of policies which merit quoting at length (California Health and Safety Code § 34201):

It is hereby declared:

(a) That there exist in the State insanitary or unsafe dwelling accommodations and that

persons of low income are forced to reside in such accommodations; that within the State there is a shortage of safe or sanitary dwelling accommodations available at rents which persons of low income can afford and that such persons are forced to occupy overcrowded and congested dwelling accommodations; that these conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals, and welfare of the residents of the State and impair economic values; that these conditions necessitate excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health and safety, fire and accident protection, and other public services and facilities.

(b) That these slum areas cannot be cleared, nor can the shortage of safe and sanitary dwellings for persons of low income be relieved, through the operation of private enterprise, and that the construction of housing projects for persons of low income would therefore not be competitive with private enterprise.

(c) That the clearance, replanning, and reconstruction of the areas in which insanitary or unsafe housing conditions exist and the providing of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which public money may be spent and private property acquired and are governmental functions of state concern; that it is in the public interest that work on such projects be commenced as soon as possible in order to relieve unemployment which now constitutes an emergency; and the necessity in the

public interest for the provisions of this chapter is declared as a matter of legislative determination.

In 1966 the city council of San Jose found and declared (J.S. App. 25):

(a) Insanitary and unsafe inhabited dwelling accommodations exist in the City of San Jose, California;

(b) There is a shortage of safe and sanitary dwelling accommodations in the City of San Jose, California, available to persons of low income at rentals they can afford;

(c) There is a need for a housing authority to function in the City of San Jose, California * * *.

(3) Unlike *Hunter* where the charter amendment arguably applied to all persons equally in the sense that protective legislation for any racial, religious, or ethnic class would be subject to prior referendum approval,¹¹ the present case involves a constitutional provision which is discriminatory on its face. By its terms, the prior-referendum requirement of Article 34 applies only to

any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise.

¹¹ But see *Shelley v. Kraemer*, 334 U.S. 1, 21-22.

"Persons of low income" are defined as

persons or families who lack the amount of income which is necessary * * * to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

These classifications embodied in Article 34 correspond closely to the classifications drawn in *Hunter*, where, from the broad class of ordinances regulating real estate transactions (like government-assisted housing developments), a smaller class was singled out for the burden of the prior-referendum requirement. Article 34 similarly singles out for a like burden a small category of the spectrum of governmental actions involving public expenditures and determining how land will be used, and more narrowly discriminates between housing developments assisted in any manner by the state or federal governments which are designed for low-income persons and publicly assisted housing designed for other residents.¹³ The condition precedent of referendum approval applies only to the former. Moreover, Article 34 is openly predicated on the need of some state citizens for public assistance in obtaining minimally adequate housing facilities; since it specifies who is to bear the burden of its impact, the distinction drawn between persons who, without low-income housing, would be financially unable

¹³ 1969 HUD Statistical Yearbook indicates that numerous programs of federal mortgage and other assistance for housing not specifically designed for low-income persons are in use in California.

to obtain "decent, safe and sanitary dwellings" and all others is clear from its terms.

(4). Finally, in our view, there is no more justification for the State's discrimination in this case than there was for that in *Hunter*.

Article 34 embodies a discrimination on the basis of wealth, defined in terms of ability to obtain minimally adequate housing accommodations. It is neither "a law of general applicability that may affect the poor more harshly than it does the rich," *Douglas v. California*, 372 U.S. 353, 361 (Mr. Justice Harlan, dissenting), nor an "effort to redress economic imbalances," *ibid.* Rather, it falls squarely within the rule that "[t]he States, of course, are prohibited by the Equal Protection Clause from discriminating between 'rich' and 'poor' as such in the formulation and application of their laws." *Ibid.* Accordingly, the stringent standard applied in *Hunter* is equally applicable here, for not only have "lines [been] drawn on the basis of wealth * * * which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny," *McDonald v. Board of Election*, 394 U.S. 802, 807, but also the suspect classification burdens a highly important and favored interest—the need to obtain adequate housing.¹³

¹³ See the legislative findings quoted *supra* at pp. 11-13; *Hunter v. Erikson*, *supra* at 391. And see *Buchanan v. Warley*, 245 U.S. 60; *Block v. Hirsh*, 256 U.S. 135, 156; *Harmon v. Tyler*, 273 U.S. 668; *Richmond v. Deans*, 281 U.S. 704; *Shelley v. Kraemer*, 334 U.S. 1; *Hurd v. Hodge*, 334 U.S. 24; *Barrows v. Jackson*, 346 U.S. 249; *Reitman v. Mulkey*, 387 U.S. 369; *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409; *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229.

Article 34 cannot be justified on the ground that it neutrally enables the electorate to participate in governmental decision-making that may affect the public fisc. The classification made by Article 34 is clearly not fiscal. As the court below observed (A. 176-177), Article 34 does not apply to numerous publicly assisted projects which affect the public fisc and may be undertaken without obtaining referendum approval. It is thus as impermissibly selective as would be a provision requiring referendum approval of an individual's taking up a new residence only when the new neighborhood is populated predominantly by persons of another race. Cf. *Harmon v. Tyler*, 273 U.S. 668. Moreover Article 34 does not permit the electorate to initiate acquisition or construction of low-income housing projects by invoking the referendum process, but merely permits a majority of the electorate to veto an official decision to assist a minority by providing needed housing. Since the electorate has thus acquired only the right to prevent government officials from providing low-income housing in accordance with their statutory authority, Article 34 can only operate to the detriment of the low-income minority, just as in *Goss v. Board of Education*, 373 U.S. 683, a minority-to-majority school transfer option could only operate to perpetuate racial segregation, *id.* at 686-687; cf. *Hunter v. Erikson*, *supra* at 391; see, also, *id.* at 395-396 (Mr.

Justice Harlan, concurring). And it is also significant that the referendum requirement does not merely provide an opportunity to review decisions to provide low-income housing, but is a condition precedent to their effectiveness."

Of course, the purpose of Article 34 may be precisely to enable the electorate to prevent local officials from exercising their statutory authority to provide low-income housing. But, as the Court observed in *Hunter*, that "emphasizes the impact and burden of [the provision] but does not justify it." 393 U.S. at 392.

There is, in sum, nothing to suggest that Article 34's "classifications are rooted in reason," *Griffin v. Illinois*, 351 U.S. 12, 21 (Mr. Justice Frankfurter, concurring), and it surely does not meet the more stringent test applicable here (see *supra*, pp. 8-9, 15).

¹⁴ We recognize, of course, that administrative procedures and requirements of various government programs will differ, and our position is not that such differences are impermissible. But Article 34 is not an integral part of the state's statutory scheme for responding to the need for low-income housing. It is instead a condition precedent superimposed upon it by constitutional amendment. In this sense, the discrimination may be more fundamental and perhaps less justifiable, just as the constitutional amendment considered in *Reitman v. Mulkey*, 387 U.S. 369, went beyond mere repeal of a fair-housing statute and "constitutionalized the private right to discriminate." *Id.* at 376; see *id.* at 377, 381; cf. *Hunter v. Erikson*, *supra* (amendment to city charter).

For the foregoing reasons, the decision of the court below should be affirmed.

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FEBRUARY 1971.

APPENDIX

Article 34 of the California Constitution provides:

§ 1. Approval of electors; definitions

Section 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

For the purposes of this article the term "low rent housing project" shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. For the purposes of this article only there shall be excluded from the term "low rent housing project" any such project where there shall be in existence on the effective date hereof, a contract for financial assistance between any state public body and the Federal Government in respect to such project.

For the purposes of this article only "persons of low income" shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the

housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

For the purposes of this article the term "state public body" shall mean this State, or any city, city and county, county, district, authority, agency, or any other subdivision or public body of this State.

For the purposes of this article the term "Federal Government" shall mean the United States of America, or any agency or instrumentality, corporate or otherwise, of the United States of America. (Added Nov. 7, 1950.)

§ 2. *Self-executing provisions*

Sec. 2. The provisions of this article shall be self-executing but legislation not in conflict herewith may be enacted to facilitate its operation. (Added Nov. 7, 1950.)

§ 3. *Partial validity*

Sec. 3. If any portion, section or clause of this article, or the application thereof to any person or circumstance, shall for any reason be declared unconstitutional or held invalid, the remainder of this article, or the application of such portion, section or clause to other persons or circumstances, shall not be affected thereby. (Added Nov. 7, 1950.)

§ 4. *Conflicting provisions superseded*

Sec. 4. The provisions of this article shall supersede all provisions of this Constitution and laws enacted thereunder in conflict therewith. (Added Nov. 7, 1950.)

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In the Supreme Court of the
United States

OCTOBER TERM, 1970

No. 226

VIRGINIA C. SHAFFER,

Appellant,

vs.

ANITA VALTIERRA, et al.

On Appeal from the United States District Court for the
Northern District of California

Reply Brief of Appellant Virginia C. Shaffer

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 226

VIRGINIA C. SHAFFER,

Appellant,

vs.

ANITA VALTIERRA, et al.

On Appeal from the United States District Court for the
Northern District of California

Reply Brief of Appellant Virginia C. Shaffer

Appellant replies to 3 briefs totalling 132 pages, those of (1) appellees Valtierra, et al. (the plaintiffs) and (2) the Housing Authority of San Jose, and (3) the *amicus* brief of the Attorney General of New York.¹

All emphasis in quotations in this brief has been added unless otherwise noted.

1. Hereafter referred to, respectively, as "Valtierra", "Housing Authority" and "N.Y."

The notation "O.B." refers to appellant Shaffer's opening brief.

The Housing Authority was a defendant below, not a plaintiff, but now styles itself as "appellee" and seeks affirmance of the *judgment against it*.² The interest of *amicus* is enigmatic.³ To reply to the several briefs *seriatim* would be repetitious. We shall endeavor to extract from them a series of intelligible propositions and then answer them.

I.

THE ISSUE IN THIS CASE IS NOT HOUSING. IT IS WHETHER CONSTITUTIONAL LAW IS TO CROSS A CONTINENTAL DIVIDE INTO A NEW WATERSHED RADICALLY ALTERING OUR DUAL SYSTEM OF GOVERNMENT AND SUPPLANTING VOTER DETERMINATION BY JUDICIAL DECISION

With copious citation of current literature and with masses of statistics from a variety of unauthenticated sources, our adversaries tell us, often persuasively, of the need of low income housing in the United States, of the unfortunate plight of fellow Americans disadvantaged because of color or descent, of the damage to persons and personality from ghetto living. They even re-wage old battles by talking of discrimination in the sale and rental of real estate (e.g., Valtierra, 25, 26). In a proper forum we might agree with much of that presentation. Our adversaries then proceed to tell us that, in order to achieve desirable social goals, low-income *public* housing should not be subject to voter

2. Pointing to the fact, among others, that the Housing Authority had not contested the case against it below and had not appealed, our opening brief said that this was a feigned case (O.B. 28). The appearance of Housing Authority in this Court as an appellee confirms our statement.

3. Since the *amicus* brief was filed November 5, 1970, ten days after expiration of the time for filing appellees' briefs, it seems too late under Rule 42(2). But it adds nothing, and we answer it in stride, although it is difficult to see what genuine interest the Attorney General of New York can have in a provision of the Constitution of California. His explanation for tendering a brief is that "opponents of public housing in other States may be encouraged" to adopt similar provisions (N.Y.2). Thus the Attorney General of New York distrusts the general voters of his State and asks this Court to forestall them from action unpalatable to those who have his ear.

review. That too may—or it may not—be so. We decline to debate that question in this case because it is not an issue here, and this is not the forum in which to present it.⁴ That question is a political or legislative one, and the proponents of its two—or several—sides should put their case to the people of California to repeal, amend, or retain the State Constitution.

The issue in this case transcends public housing. We submitted in our opening brief (O.B. 25):

"The assault on Article XXXIV is a manifestation of a new distrust of democracy and democratic processes in favor of an elitism that considers itself a wiser guide for the solution of the economic and social problems of the republic, an elitism contemptuous of the wisdom and fairness of [the] ordinary voter."

Our adversaries' briefs confirm that submission. What they contend is that, *as a matter of constitutional law, voters are to be held inherently disqualified from passing on certain kinds of issues.* Step by step this will spread from some issues to *all* issues. The voters are accused of being biased and unworthy to pass on important questions better left to wiser heads! Valtierra asserts (p. 27):

"Article 34 has no other coherent function or inevitable effect than to authorize and invite a racial veto within the administration of a governmental housing program. It is accordingly unconstitutional."

Housing Authority (p. 38) argues that to allow local voter control is to work against the best interests of the locality, because local governing bodies and housing authorities have determined

4. Our adversaries constantly overlook statements of our opening brief like this:

"We note the several methods, *not to tender any view of our own that one is better than another, but to say that voters may legitimately think so, wholly divorced from racial prejudice, and it is reasonable to let them be heard at the polls.*" (O.B. 42; emphasis in original)

what is good.⁵ Valtierra states (p. 68) that it does not ask that the "Court review the mental processes of voters at particular referenda, to determine whether they voted for constitutionally forbidden reasons" but that to allow the electorate to vote at all is to make it possible for a racial determination to occur. Ergo, it is unconstitutional to let the electorate vote. Ergo, the decision is to be reserved to a wiser elite!

The argument is that the electorate acts in ways wholly capricious, not governed by any ascertainable standards. But that is equally true of the electorate whenever it votes, for any candidate or on any measure. Is democracy then unconstitutional? By this logic, to allow legislators to vote is also to permit a racial determination under pressure or attraction of influences. The inevitable end of the logic is that all decisions are to be reserved to the courts as the only repository of trustworthy authority.

To support this argument reference is had to cases where unbridled discretionary authority without limiting standards has been conferred on *administrative officials* and exercised consistently to bar minorities from voting or the like⁶ (Valtierra, 68). Such cases have no relevance, and for two reasons. In the first place Article XXXIV has not remotely approached exclusion of all low-income housing. As already seen (O.B. 28, 29), sixty-nine percent (69%) of all elections under Article XXXIV from 1950 through June 1968 resulted in approval of the housing project, eighty-four

5. A younger generation would phrase that as "father knows best" and resent it.

6. In *Louisiana v. United States*, 380 U.S. 145 (1965), a statute conferred on the registrar of voters absolute power to exclude from the vote anyone who could not "give a reasonable interpretation" of any section of the state or federal constitution "when read to him by the registrar", and all registrars applied the test so as to keep Negroes from voting. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the ordinance provided that no laundry in a wooden building could be operated within the city without permission of a board which permitted *all* whites and denied permission to *all* Chinese.

percent (84%) did so from 1968 to 1970, and of 8 on the ballot at the time of the San Jose vote 7 were approved.

More fundamentally, the cited cases have no relevance because *the electorate cannot and must not be assimilated to administrative officials*. The motives of voters are not to be examined by courts; the right to vote is not to be denied because of fear that voters may act unwisely or discriminatorily. Local government is the pervasive characteristic of our republic. The very cases our adversaries cite contain statements by this Court that the right to vote "rank[s] among our most precious freedoms" and that "other rights, even the most basic, are illusory if the right to vote is undermined" (*Williams v. Rhodes*, 393 U.S. 23, 30, 31 (1968)). And this Court has recognized that "virtually every American lives within what he and his neighbor regard as a unit of local government with general responsibility and power for local affairs" (*Avery v. Midland County*, 390 U.S. 474, 483 (1968)). In *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), the Court distinguished between administrative bodies and the people themselves, saying:

"* * * we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, *sovereignty itself remains with the people, by whom and for whom all government exists and acts*. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the *suffrage*."

Compare this judicial statement with the inverted theory of N.Y. 9 that "California has in effect entrusted its zoning powers to private persons and groups"! Thus the sovereign's retention of a power is assailed as an unconstitutional delegation by the sovereign's agent to the agent's principal!

The logical end of the road our adversaries ask the Court to enter—the road of judicial examination of voter motives or of interdiction of reference to voters—is the substitution for our republican form of government of judicial rule.

Here, as elsewhere in their arguments, when their reasoning brings them starkly up against the logical end, appellees recoil, in words, but not in substance. Thus Valtierra (p. 68) states:

"We do not urge that all referenda in public housing matters would be invalid for this reason. Nor does our submission seek to have the Court review the mental processes of voters at particular referenda, to determine whether they voted for constitutionally forbidden reasons."

Instead, what Valtierra asks is the more sweeping interdiction of any referendum for low-income housing because, forsooth, the voter is to be deemed untrustworthy in that area.

An Article XXXIV election is a step in the legislative process, the last in a series necessary to put into effect a low-rent public housing project in California (Valtierra, 6-12 describes most of these steps). The proffered basis for holding Article XXXIV violative of the Equal Protection clause is that there is a necessary effect inherent in the fact that decisions are to be made and that those who make them *may* be actuated by improper motives. That effect and possibility are as inherent in each of the chain of prior decisions—the decisions of the City Council to approve the project, to approve the application for a preliminary loan, and to enter into an agreement for local cooperation, and in a still earlier requirement that, although a housing authority is automatically created by State law in every city and county, it may exercise no powers until the local governing body declares that

there is need for it to do so.⁷ Unless the Court is willing to hold that, upon a finding by a three-judge court that there is a need for low-cost housing in the State or a particular city or county, it could (a) order the legislature of California to accept the Federal offer of housing aid and the voters not to reject the legislation, (b) dictate the details of the State enactment, (c) order a Housing Authority into existence whether the local governing body finds a need for it or not, (d) order the local governing body not to disapprove a particular project if the court finds it is a needful one, then there is no logical basis to hold that a requirement of local voter approval violates the Constitution.

On the contrary, there is a sanctity about the electoral process inherent in the American system that cloaks the right of the voter with an invulnerability none of the other steps possesses. In *Williams v. Rhodes*, 393 U.S. 23, 39 (1968) Mr. Justice Douglas remarked:

"I would think that a State has precious little leeway in making it difficult or impossible for citizens to vote for whomsoever they please and to organize campaigns for any school of thought they may choose, whatever part of the spectrum it reflects."⁸

7. Compare Winston W. Crouch, *The Initiative and Referendum in California* (The Haynes Foundation, Los Angeles, 1950):

"Persons seeking to prevent a measure introduced in the legislature from becoming law have several opportunities to achieve that result. In the first place the bill may be defeated or materially altered in committee. Failing this, opponents may carry the fight to the legislative chamber. Furthermore, opposition is not confined to one house. All tactics may be duplicated as the bill proceeds through the second house. After a bill has passed both houses opponents may still seek to persuade the governor to veto it. This is the normal course of legislative opposition.

"The referendum stands as the last-resort check upon the legislature."

8. In *Hadnott v. Amos* (U. S. D. C., M. Ala., Oct. 19, 1970), 39 L. W. 2263, a three-judge court said: "His [the voter's] qualifications are minimal, and he need not subject himself to the scrutiny of anyone in the performance of his role in selection of public officers."

Nothing is Here Claimed to Violate "Equal Protection" Except the Provision for Referendum Itself

Our adversaries avoid the issue by a diversionary argument. They argue that the fact that voters, instead of legislators, adopt legislation does not immunize it from the 14th Amendment, that constitutional rights cannot be infringed simply because a majority of the people choose so.⁹ We agree: An enactment that would violate the Equal Protection Clause if enacted by a state legislature will violate it if enacted by the people. Our opening brief said (O.B. 55):

"Hunter v. Erickson tells us that a 'legislative structure which otherwise would violate the Fourteenth Amendment is not immunized by popular referendum' (p. 392). But that is not this case. *Here it is not claimed that anything violates the Fourteenth Amendment except the provision for referendum itself! Hunter v. Erickson* also reminds us * * * that the 'sovereignty of the people is itself subject' to constitutional limitations on the State. That principle, as *Hunter v. Erickson* itself applies it, reaches a rearrangement of the distribution of legislative powers on racially discriminatory lines. That is not this case either."

None of our adversaries meets this statement, that what is here claimed to violate the 14th Amendment is *nothing but the provision for referendum itself*. In short, it deflects reasoning to say that acts of the electorate may be unconstitutional. *The question in this case is whether the mere requirement that a question be put to the electorate violates the Constitution*. And that question strikes even deeper. The final control and the direct voice of the electorate are of the very bone of democracy

9. Thus N.Y. (9) cites *Lucas v. Colorado General Assembly*, 377 U.S. 713 (1964), which held that a violation of the one-man one-vote principle is not immunized because effected by popular initiative.

in California. In no other State is this so true. Winston W. Crouch, "The Initiative and Referendum in California",¹⁰ points out:

"The electorate of this state has been accustomed to expressing itself on matters of state and local policy since the state government was first established. The first constitution, adopted in 1849, * * * required all constitutional amendments to be submitted to the people in a manner prescribed by the legislature. It also directed that state bond debt proposals be presented to the voters, and required approval, by a majority of the vote cast, for adoption of these proposals. * * * Furthermore, between 1873 and 1876 the state permitted townships and cities to have local option on liquor licenses. The 1879 constitution went even further. Cities, counties, and school districts were prohibited from incurring indebtedness unless two-thirds of the voters casting their ballots agreed to the proposal.

* * *

"Many features of direct legislation had their origin in city government. * * * Municipal home rule, which was instituted in this state by the second constitution, did a great deal to extend the principles of direct legislation. In the first place, a city charter drafted by a local freeholders' board was to be submitted to the city's voters. Secondly, all amendments to the charter had to be submitted in a similar manner. * * * [p. 2]

* * * *

"By and large, however, California has been a leader in the development of this form of legislative process. * * * [p. 4]"

What appellees ask, therefore, is for this Court to strike at a basic characteristic of democracy in California.

The Effect on the Judicial Process

We submitted (O.B. 56-60) that the course upon which our adversaries seek to have the courts embark is to inquire whether

10. Published, 1950, by The Haynes Foundation, Los Angeles. Dr. John R. Haynes was a leader in the direct legislation movement in California from 1901, which gained strength when Hiram W. Johnson was elected governor in 1910.

the structure of State government makes it more difficult for one "group" to obtain advantages than another and to analyze different forms of governmental structure to the end of determining which is more likely to be equally attuned to the demands or needs of all groups into which the citizenry falls. Among other unfortunate consequences, that task will embroil the courts in an inspection and comparison of the infinity of statutes of any State under review.¹¹

If this kind of judicial inquiry is opened up or condoned, the trial of the issues *will go in either of two directions*. Either they will be long and endless in the trial court with numerous economists, sociologists and statisticians called to the stand and subjected to cross examination. *Or else they will take the more unpardonable course this case has taken*: the course, in the court below, of a *summary procedure* with no evidence adduced but *ex parte opinion* affidavits; then, in this Court, an outpouring in briefs of citations to the writings of so-called experts and special interest groups, not only with no one subjected to cross-examination but with no issues framed by discovery and with an appellant forced to respond in a reply brief to theories never propounded below.

II.

ARTICLE XXXIV DOES NOT DISCRIMINATE AGAINST RACE OR POVERTY; THE DOCTRINES OF "FUNDAMENTAL RIGHTS" AND "COMPELLING STATE INTERESTS" HAVE NO VALID APPLICATION TO THIS CASE, AND THE CASE IS GOVERNED BY DANDRIDGE V. WILLIAMS

In *Dandridge v. Williams*, 397 U.S. 471, 485, 486 (1970), this Court reaffirmed this test of constitutionality under the equal protection clause:

11. One hardly need look beyond Valtierra's reference (47) to such things as the building of municipal auditoria, parking garages, ballfields, etc., and to the use of private property for tax exempt uses like churches, museums and colleges, to perceive the endless task of comparison our adversaries would impose on the courts.

"In the area of economics and social welfare, * * * [i]f the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality' * * *. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it * * *.' [T]he Fourteenth Amendment gives the federal courts no power to impose upon the states their views of wise economic or social policy."¹²

The foundation of our adversaries' entire argument is the claim that this basic principle is supplanted by the standard of "compelling state interest" because, somehow, Article XXXIV affects "fundamental rights". This claim rests, in turn, on a contention that Article XXXIV discriminates against race or *against* poverty, and that the latter, like the former, is a "constitutionally suspect" classification. Even *if* the "compelling state interest" test *were* applicable, we submit that California's traditional use of direct democracy satisfies that test. But that is not the applicable test, as we now see.

A. Article XXXIV Is Not Racial Legislation: Race Is No Part of This Case

Valtierra admits that Article XXXIV "does not speak in terms of race" (p. 63). Housing Authority concedes, grudgingly, that it "does not expressly classify on the basis of race" (e.g., Housing Authority, 9). Our opening brief pointed out that the disposition of this case on summary judgment precludes any adverse inferences of motives or purposes (O.B. 18). We find in our adversaries' briefs no open challenge to that statement. Yet all our adversaries try to convert this case into one involving racial discrimination. That effort is corruptive of reasoning.

12. On this basis the 7th Circuit on September 16, 1970, in *Money v. Swank*, 39 L.W. 2181, rejected the claim that a State welfare provision granting educational allowance for vocational school students but not to college students denied equal protection.

If the "poor" were white, the constitutionality of a law affecting them, *qua* "poor", would be determined by certain criteria. Is it to be determined by a different criterion because the "poor" also happen in measurable part to be black or Spanish speaking? And is that different criterion one that presumes constitutional guilt instead of constitutional innocence? We submit not. Race and color may not be badges of inferiority *under the law*; they may not be instruments by which the law oppresses or discriminates. But neither are race or color talismans whose coincidental presence works special favorable treatment.

No person fits into only one category. Every person falls into numerous categories, denoted by color, race, education, wealth, occupation, religion, etc. If a law operates upon a person by virtue of his relation to one of these categories, other than that of race or color, the coincidence of his also being black should not alter the tests by which to determine the law's constitutionality. This is not to say that a statute *whose very purpose* is to discriminate racially may escape constitutional condemnation by cleverly disguising it in phraseology; it will be judged by its intended purpose. But the fact that those who come into contact with the law in one capacity also fit into another category does not make the latter the touchstone of the law's validity. Article XXXIV is no less constitutional than it would be if there were fewer blacks or Mexican-Americans in California or none at all.

None of our adversaries contends that persons of racial minorities comprise the bulk of the poor in California. They assert only that they comprise "a disproportionately" large segment of the poor (e.g., Housing Authority 24; Valtierra 66), a plastic expression. The bulk of the poor in the County of Santa Clara, in the City of San Jose, and in the State of California are white.

Cases like *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), *Reitman v. Mulkey*, 387 U.S. 369 (1967) and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), do not support our adversaries in their effort to

make out Article XXXIV as racial legislation. In *Yick Wo* all Chinese laundries were excluded from San Francisco, and no Caucasians were. In *Gomillion* all but 4 or 5 of 400 Negroes in the city and not one white were excluded from voting by a gerrymander; the case came up on demurrer admitting the allegation of the complaint that the purpose was to discriminate racially. Nor is it true that in *Yick Wo* or *Reitman* the legislative provision was "completely neutral on its face" (Housing Authority, 25, *Valtierra*, 66, 67). The Court emphasized in *Yick Wo* that on its face the ordinance was defective in laying down no standard (see p. 4, *supra*). In *Reitman* the express purpose on the face was to prohibit legislation against racial discrimination. Cases like *Gomillion v. Lightfoot*, *supra*, and *Cipriano v. Houma*, 395 U.S. 701 (1969) are cases where fencing out some voters from voting was held unconstitutional; they are no authority for holding that all voters must be fenced out.

B. Article XXXIV Does Not Discriminate Against Poverty; It Does Not Deprive Anyone of Any "Fundamental Right"

All our adversaries expatiate about "fundamental rights" or "fundamental interests". That phrasing simply erects a curtain of words between fact and reason. And a ray of candor appears in Housing Authority at p. 29 when it concedes that it

"must candidly say that in the cases in which this Court has applied the compelling state interest test because the classification was based on wealth, a fundamental interest of the poor was also at stake."

It then asks the Court to pronounce new constitutional law, either that a "fundamental interest" is not "a prerequisite to the compelling state interest test" or else that "decent housing is a fundamental interest of the poor."

Students of jurisprudence know that the word "right" is a slippery one covering a multitude of diverse notions.¹³ There are, indeed, "fundamental rights" that one possesses because he is a citizen, such as the right to vote,¹⁴ or that he has because he is an inhabitant of the land, such as the right not to be deprived by governmental authority of life, liberty or property without due process. The State cannot deny a person a *right*, common to all and unrelated to poverty, such as the right to vote or the right to travel, because he is poor. But this case involves no situation of denying a right *because* of poverty. What we have here is something entirely different. Poverty is a fact which creates a *need*. Those lacking poverty lack the need. It does not discriminate in favor of those lacking the need and against those who have the need to prescribe the manner in which governmental authority is willing to satisfy that need. In our opening brief we phrased the matter thus:

"indigency is a social, economic and political situation to which government must give its attention, or at least rightfully may do so. And to do so is not to discriminate unconstitutionally. In turning its attention to this subject, a State has wide freedom to determine what it should do and how it should do it." (p. 43)

In the passage from *Edwards v. California*, 314 U.S. 160 (1941), quoted in Housing Authority 27, 28, Mr. Justice Jackson said:

"'Indigence' in itself is neither a source of rights nor a basis for denying them."

13. IV Roscoe Pound, *Jurisprudence* (West Publishing Co., St. Paul, 1959, § 118, p. 56, "There is no more ambiguous word in legal and juristic literature than the word right."

14. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886):

"There are many illustrations that might be given of this truth, which would make manifest that it was self-evident in the light of our system of jurisprudence. The case of the political franchise of voting is one. Though not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights."

In *King v. Smith*, 392 U.S. 309, 318, 319 (1968), the Court said:

"There is no question that States have considerable latitude in allocating their * * * resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program."

Our adversaries point to the language of Article XXXIV as "expressly classif[ying] on the basis of wealth" (e.g., Housing Authority, 27) because it defines its application in terms of poverty. But the Federal Housing Act of 1937 (42 U.S.C. § 1401, quoted in full in the appendix to the Valtierra brief) does exactly that. Article XXXIV uses the language of the federal act as the clearest way to define that the *need* to which it relates is exactly that to which the Act relates.

There are *needs* which may be fundamental to existence. As civilization changes, more species of needs may come to be deemed "fundamental" and society may increasingly think it compassionate or wise to satisfy them. But that a "need" is "fundamental" does not create a "right" to have it satisfied, certainly not a "fundamental" right embedded in the Constitution. Nevertheless, it is just this telescoping of concepts that characterizes our adversaries' arguments. If housing is a necessity of life, the Constitution does not prescribe that the States must supply necessities.

Arguments that "poverty is a constitutionally 'disfavored' classification" (e.g., Valtierra, 42) are simply a gliding from one aspect of reality to a different one entirely. So are arguments based on cases like *Douglas v. California*, 372 U.S. 353 (1963), and *Griffin v. Illinois*, 351 U.S. 12 (1956), which is quoted for its statement that "there can be no equal justice when the kind of trial a man gets depends on the amount of money he has." (Valtierra, 43). It is the nature of our society that many things are ob-

tainable only by money, but others involve no money nexus. Justice is not a commodity bought and sold for money; it is the basic attribute to assure which governments are formed.¹⁵ Because some things are beyond money does not mean that all must be. There may be a growing moral feeling about supplying to the impoverished commodities requiring money to obtain, and the time may come when the Constitution may be amended to make this a legal duty. It is not yet so.

There is a plain difference between "impos[ing] a special burden on a particular group" (Housing Authority, 13), on the one hand, and, on the other, letting the public decide the basis upon which the public will give advantages to that group.

The analogies for which our adversaries reach out in all directions show the confusion of thinking. Thus *Valtierra* (Br. 44) asserts that people have an "interest in a decent home". Then it supports that statement by arguing that, as the Constitution protects one from unlawful searches and seizures or other intrusions, it must presuppose that he "has a home whose quality is worth protecting." The Constitution does not command that such a home be given him and that anything is unconstitutional that may deflect the free flow of bounty to give him that home.

If *Valtierra's* kind of reasoning is valid, the whole constitutional fabric will be dissolvable in non-sequiturs of verbal confusion.

III.

ARTICLE XXIV CREATES NO UNCONSTITUTIONAL CLASSIFICATION. IT DOES NOT DISCRIMINATE

A. Article XXXIV Is Not Unconstitutional in Providing an Automatic Reference to the Electorate

It is clear from their briefs that what our adversaries wish to outlaw as unconstitutional is *any referral* at all to voter approval. See, for example, the passages quoted at pp. 3, 4 *supra*. But then they fall back, as a tactical device, upon a narrower argument.

15. Compare quotation in fn. 14 above from *Yick Wo v. Hopkins*.

Valtierra casts this as a claim that referenda generally provided for in California are "review referenda" whereas the referendum of Article XXXIV is not (Valtierra, 29, et seq.). But plainly an Article XXXIV referendum is a "review" referendum, for it reviews the action of the governmental agency to which initial authority has been delegated. N.Y. (11, 12) speaks in terms of an Article XXXIV referendum occurring "before any decision can be taken," but all referenda occur after someone makes a decision but before it can be put into operation. The difference between the referendum of Article XXXIV and *some*, but *far from all*, referenda is that the housing resolution of the local governing body goes on the ballot without the intermediation of a petition to put it there. Housing Authority professes that this is what it objects to, asserting (p. 15) that it is "this unique automatic referendum requirement that makes Article 34 offensive to the equal protection clause". That, at least, is a confession that the numerous other "vices" about which our adversaries write at length are not what makes Article XXXIV unconstitutional.

This "automatic" referendum is not unique; *on the contrary, it is the earlier form in California*. Our adversaries rely on the fact that in *Hunter v. Erickson*, 393 U.S. 385 (1969), an amendment of the charter of the City of Akron providing for an automatic referendum was held to violate equal protection. But this Court was not there laying down any general proposition about automatic referenda. The essence of *Hunter* was that there

(1) the *sole and only purpose* of the amendment was to make referenda on a particular subject automatic, for Akron already had a general referendum provision that would apply to the subject but for the amendment; and

(2) the subject there singled out for different treatment solely in respect of the automatic reference was legislation outlawing discrimination because of race and color. The charter amendment repealed anti-discrimination legislation

already on the books and required all new legislation of that type to be automatically referred. The Court noted (393 U.S. at 389) that "Here . . . there was an explicitly racial classification."

Thus in *Hunter*, there could have been no other purpose but to discriminate against anti-racial legislation. And it is elementary that, whenever one acts with a specific purpose, an inference follows that what he does is reasonably calculated to effect that purpose.

By contrast, Article XXXIV repealed nothing, and it did not replace an otherwise applicable referendum law. The very reason for its adoption was that the Supreme Court of California had just held that California's general referendum law was not applicable (O.B. 6, 7). The fact that, in the course of curing the defect, Article XXXIV differs from the general law in not requiring a petition is a difference but not a constitutional defect. On the contrary, when the Supreme Court of California, in *Housing Authority v. Superior Court*, 35 Cal.2d 550, 219 P.2d 457 (1950) held that acts of local governing bodies relative to low-income housing were not subject to the general referendum requirements at all—thereby leading to Article XXXIV (O.B. 6, 7)—it demonstrated that low-income housing fell into a different classification. If sufficiently different as to warrant no referendum before Article XXXIV, it is sufficiently different to warrant a no petition referendum.

The structure of government need not be the same for all types of governmental activity (O.B. 54, et seq.). We submitted (O.B. 54) that the Equal Protection clause does not forbid a "State from requiring voter approval of anything unless it requires voter approval of everything." Just so, an automatic referendum of everything is not required before there may be an automatic referendum of anything.

There are numerous examples of automatic referenda in California. It is the older form in California, long antedating the petition referendum. Crouch, "The Initiative and Referendum in California" (see fn. 7, *supra*) notes:

"Several types of direct legislation exist in practice. [p. 4]

* * * *

"Three types of referendum likewise are found in state practice, if we follow the correct definition of the term referendum. *That used with greatest frequency is known as the compulsory referendum. This type has been in use since the beginning of state government in California* and sometimes is not regarded by the average voter as a referendum. Measures such as constitutional amendments and bond issues proposed by the legislature must be placed before the voters and approved by a majority of those voting on each proposition. This does not require any petition. * * * [p. 5]

"Types of direct legislation in local governments differ slightly from those in state-wide practice. * * * The compulsory referendum applies to charter amendments proposed by the local legislative body, bond issues, and, in a few places, to the granting of franchises. * * * [p. 6]

Crouch (p. 7) notes a city charter provision requiring a referendum before public lands may be granted away. Thus, as a broad generalization, California provides for the automatic or compulsory referendum in three types of situations: (1) in matters involving disposition of public property, (2) in matters involving creation of fiscal burden on *the general taxpayer*, and (3) in distribution of the powers of the sovereign people among their several agencies including themselves. By contrast, the petition referendum was introduced under the governorship of Hiram W. Johnson for matters involving the exercise of the police power, that is, regulation by law of the duties and conduct of the citizenry.

The Charter of the City of San Jose provides that no property used as a public park may be discontinued without a vote of the

public upon an automatic referendum.¹⁶ Illustrative of type 2 is the basic policy of California that no bonded indebtedness can be incurred by either the State or any city, county or school district without an automatic referendum (Cal. Const. Article XIII, Sec. 40; formerly Art. XI, Sec. 18). There are several examples of type 3. The Constitution of California can only be amended by automatic referenda (Art. XVIII, Sec. 4, formerly Sec. 1). Local charter governments can be formed only on automatic referenda (Art. XI, Sec. 3(a), formerly Sec. 8(e)), and they are normally amendable only by automatic referenda (Art. XI, Sec. 3(a), formerly Sec. 8(h)). Territorial annexations require automatic referenda (Art. XI, §§ 1(a), 2(b), formerly 7½b, 8½).¹⁷ California's statute books are full of legislation first enacted by the initiative process, and no law so enacted can be amended or repealed except by vote of the electorate (Cal. Const. Art. IV, Sec. 24(c)). It is no answer for Valtierra to call these "extraordinary matters" (fn. 29, p. 32); that is merely a euphemism for the basic principle that classification of different matters differently is not unconstitutional.

16. San Jose Charter: "Section 1700. Parks. Except as otherwise provided elsewhere in this Charter, the public parks of the City shall be inalienable unless otherwise authorized by the affirmative votes of the majority of the electors voting on such a proposition in each case; provided and excepting, however, that the same or any interest therein, or any concessions or privileges therein or in any building or structure situate therein, may be leased by the Council, or the Council may grant permits or licenses for the same, without any vote of any electors, if the term of each such lease or permit does not exceed three (3) years. As used herein 'public parks' means any and all lands of the City which have been or are dedicated, improved and opened to the public for public park purposes."

17. In *Adams v. City of Colorado Springs*, 399 U.S. 901 (1970), affirming *per curiam* 308 F.Supp. 1397 (D.Colo.), a state statute denying referendum to the voters of territory to be annexed by an adjacent city while granting it to other annexations was held not violative of the equal protection clause.

It is at once evident that an Article XXXIV referendum partakes of types 1, 2 and 3. It is of type 1 because it concerns the disposition of public property. It is of type 2 because the fiscal burden on a locality from low-rent housing falls on the general taxpayer and remains that kind of burden for 40 years, as we amplify at pages 30 to 31 *infra*. It is of type 3 because it involves retention by the people of that part of sovereignty having to do with protecting the quality of the environment from the uses of public funds and public property, as we amplify at pages 31 to 33 *infra*.

Moreover, the fact that Article XXXIV provides for referenda without a petition has been deemed of no practical significance by the California Constitutional Revision Commission. That Commission was established in 1963 and is engaged in reviewing the constitution and recommending revisions, not for the purpose of changing substance but to simplify expression and relegate detail to statutes.¹⁸ Describing its work and its recommendations, the Commission has represented to the public that in "no case do we lose any rights or privileges now guaranteed by the Constitution. Revision removes only redundant material, vague phraseology, 'whereofs,' 'therefores,' and other unnecessary language."¹⁹ Again it has said, "Substance is improved by retaining only our basic political concepts, the framework of government, and protection of the rights of the people."²⁰ In March 1970, this Commission

18. Created by Assembly Concurrent Resolution No. 77, 1963 Stats., Regular Session, Ch. 181; No. 7, 1963 Stats., First Extraordinary Session, Ch. 7. Res. 77 recited that the State constitution had grown to over 70,000 words as compared to 7500 of the federal constitution, and that "A constitution should contain only the basic and fundamental law of a state, rather than being filled with detailed and statutory material".

19. Pamphlet, "A Move to Improve," issued by Constitution Revision Commission, 1062 State Building, San Francisco, California 94102, containing proposed revisions appearing on the June 2, 1970 ballot.

20. Pamphlet, "4 Proposals for Constitutional Revision," on the ballot of November 1970.

officially recommended reducing Article XXXIV to one sentence reading:

"A low-rent housing project may not be developed, constructed or acquired by a public body unless first approved by the governing body of the county or city where situated. Approval is subject to referendum."²¹

This revision would bring the subject within the general referendum provisions and reflects the view of the Commission that it works no fundamental change.

Affirmance of the judgment in this case on the ground that Article XXXIV provides an automatic referendum would be an exercise in legal calisthenics, for it would be either an idle act or an unnecessary one. If the people of California no longer favor the principle of a public vote on low-income housing, they would repeal Article XXXIV if the matter were put to them. If they still favor the principle, the revision of Article XXXIV recommended by the Constitution Revision Commission would then be adopted to replace a voided Article XXXIV. Then our adversaries will be back in court, assailing the requirement of any public vote at all. *That is the basic question; the argument about an "automatic" referendum is pure diversion.*

A contrived argument is made that the burden to conduct a political campaign is somehow placed "upon the poor, who are least able to finance a popular electoral campaign" (Valtierra 31; Housing Authority, 12, 13). Our opening brief (pp. 57, 58) pointed to the fallacy of defining those who desire low-income housing as a "group" characterized as the "poor." Such housing is warranted and has been upheld because it serves the interest of the whole of society; otherwise it would be invalid as a gift of public funds to private parties. Pro-housing forces are widespread,

21. Page 67 of Proposed Revision of the California Constitution, 1970, Part 2, California Constitution Revision Commission (Suite 1065 State Building, San Francisco), transmitted to the Joint Committee on Rules, March 10, 1970.

formidable, strong and well-financed. Nothing demonstrates that fact more vividly than the array of organizations that sought to file *amici* briefs for affirmance here, a veritable "poverty-industrial complex". There are the massed phalanxes of federally financed agencies, organized labor, builders, building manufacturers, housing organizations, and civil rights organizations. In the pull and haul of forces competing for the vote of the electorate the partisans of public housing and their opponents represent democracy at work. To say, therefore, that here "what is being denied to the poor is a right of access to normal political channels" (Valtierra, 42) or right of "access to the ordinary law-making processes of government" (Valtierra, 26) is sheer hyperbole.

No burden is placed on proponents of low-income housing to obtain signatures to get the proposal on the ballot; the adoption of the program by the governing body of the locality places it on the ballot. Conversely, the task of those opposing the project is not materially eased, for any practical purpose, by not requiring a petition. A petition need be signed by only 5% of the voters to bring a state statute to referendum; the Charter of the City of San Jose specifies only 8% to bring an ordinance to referendum (Valtierra, 29; Housing Authority, 14). Our adversaries' reiterated complaint is that the public is so opposed to low-income housing that it votes projects down. If public feeling is correctly so described, it would be pure routine to obtain the necessary signatures to a petition. Crouch (see footnote 7, *supra*) points out that "A perusal of the election results since 1912 indicates that every measure placed upon the ballot by petition, no matter how thoroughly defeated, has polled several times more votes than the number of signatures required to place it on the ballot." [p. 14] Conversely, if opposition to a project is so slight that sufficient signatures were unobtainable if required, the project will not be defeated at the polls.

Before Article XXXIV can be outlawed as violative of Equal Protection because an Article XXXIV referendum is automatic,

it must be shown that this is an irrational classification. Thus the case returns to the only pertinent inquiry, which we now proceed to consider further.

B. Article XXXIV Creates No Discrimination Between the Members of Any "Class", However Described

The one brief which essays in any orderly way to describe how "Article XXXIV fails to accord similar treatment to all * * * members" of some supposed class is that of Housing Authority. By arranging our reply around that presentation, with reference to the others, we answer all. Housing Authority concedes (19) that "The court below selected as the similarly situated class all who would benefit from other types of federally funded local projects." But Housing Authority has so little faith in that reasoning that it conjures up three other "classes" and ranks the lower court's "class" in third place of importance among the four.

1. ALLEGED CLASS ONE

The first "class" postulated by Housing Authority is "all who seek to regulate the real estate market in their favor" (Br. 8, 17). This means nothing unless it is intended to mean that *all* governmental action respecting real estate in any of its numerous forms, aspects, and relations to man and society must be regulated in the same way; in short, that the fundamental principles of classification under the Equal Protection clause do not apply to real estate. For this extraordinary proposition *Hunter v. Erickson*, 393 U.S. 385 (1969) is cited because it contains the phrase, "those who sought to regulate real property transactions". But what *Hunter* contrasted was the distinction drawn by the Akron charter amendment "between those groups *who sought the law's protection against racial, religious or ancestral discriminations* in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends" (p. 390). We have described the rationale of *Hunter* at pp. 17, 18 *supra* and refer to that discussion.

2. ALLEGED SECOND CLASS

The second "class" postulated by Housing Authority is "those who would benefit from all types of public housing constructed or acquired by the State" (pp. 8, 18). *But there is no State supported public housing in California except low-income housing.* Arguments like Valtierra's (p. 52) that "Article 34, notably, requires no vote on *rich*²² constructions" are pointless because the State of California does not aid rich constructions.

Our adversaries' argument relative to this supposed second "class" falls into three types.

(a) Complaint against the United States

Under our dual system of government there are areas of affairs where the United States may legislate directly upon the people or offer its bounty or aid directly to them without the intermediary of the States. But the United States did not choose to provide for low-income housing without the intermediation of the States. By the Housing Act of 1937 it chose to channel its aid to people of low-income groups by offering assistance to States. On the other hand, it chose to aid middle income housing directly. The aid to middle-income groups is in the form of various FHA mortgage insurance and subsidy programs, all examples of federal action operating directly upon the people or through private mechanism. The briefs of our adversaries dwell on this *federal aid to middle-income housing* and complain of inequities in a system wherein federal housing subsidies are made available for the "poor" only on local vote but are available to those of higher income without that approval (e.g.; Housing Authority, 20-21; Valtierra, 60-62). The difference lies in what Congress has done. Perhaps an Equal Protection charge lies against the United States for extending aid to middle-income groups directly but to low-income groups only by way of offers of assistance to the States. But that is not the charge of this case. *Neither the State of California nor its political sub-*

22. Emphasis in original.

divisions participate in aid to middle-income housing. Those discontented with these diversities should direct their grievance to Congress. In fact, Congress has already turned to programs of direct aid to those of low income. The Rent Supplement Program and the Section 236 program (see O.B. 40, 41) involve housing privately built, owned and managed with FHA financing or with direct interest subsidies.

(b) Speculations about the future

The gist of our adversaries' second type of argument is that *some day California might supply housing to those of middle income* (Valtierra 34, 35). It is admitted that "public housing currently *in existence*²³ in California is low cost public housing", but it is said that other kinds of public housing "*can be developed in California*" (Housing Authority, 18). But the time to raise an argument of unequal protection will come only if and when California should provide middle-income housing. It may never do so. Or, when it does, (a) it may write into its statute provisions like Article XXXIV, or (b) amend Article XXXIV to cover middle-income housing, or (c) the factual circumstances may support different treatment.

In their search for "discrimination", appellees point to California statutes providing aid to housing for *agricultural labor* for which a public vote is not required (*e.g.*, Valtierra 34; Housing Authority 19). But this certainly is no support for a claim of discrimination against the "poor" or against racial minorities. Agricultural laborers are "poor". In common knowledge, agricultural labor is composed largely of members of minority groups, in California Mexicans or Mexican-Americans. The charge of "discrimination" thus becomes one, not of discrimination against the "poor," but of diverse treatment as between two categories of poor, those who are not agricultural labor and those who are. Obviously, a multitude of considerations may warrant different classi-

23. Emphasis in original.

fication here. And since the classification is *not against race, color, or "poor"*, it is not one of the "suspect" which require that "exact-ing judicial scrutiny" appellees invoke (e.g., Valtierra, 42).

Moreover, if this be the claim, it should have been made and tried out in the District Court where evidence could have been adduced on the subject to enable a judgment to be made about the reasonableness of the classification.

Valtierra (fn. 35, pp. 34, 35) and Housing Authority (p. 18) refer to a California Act of 1968 relative to *urban renewal* and argue that middle income housing could be provided under this Act *although none yet has*. Moreover, the thrust of the urban renewal act is the elimination of *blighted areas*, a classification wholly different from anything under consideration in this case. We reviewed California *urban renewal* legislation in our opening brief (pp. 48, 49) and showed that it is subject to voter review, some automatic and mandatory.

(c) Comparisons with regulation of private property

Our adversaries say that state law does not require voter approval of high-rise luxury apartments having undesirable features or of cement plants or shopping centers (Valtierra, 33, 52) or some kinds of zoning decision (Housing Authority, 37). *But none of these involve public construction or public aid*. They involve a different aspect of government authority, zoning laws and regulations, which come under the police power to regulate the use of private property. Perhaps it might be sound policy to let the citizenry have a veto over zoning decisions. But to place the regulation of private property in one classification and provision of public housing in another is not arbitrary or subject to challenge as reaching into "suspect" areas. The rule applicable to this kind of classification is that of *Dandridge v. Williams*, 397 U.S. 471 (1970).

In similar vein our adversaries argue (Housing Authority 34, 35) that the tax exempt status of public housing is no basis for

requiring voter approval because libraries, schools, museums, religious purposes, and so on, have tax exemption under various statutes or constitutional provisions. This kind of argument would drive courts into the bottomless quagmire of measuring differences between countless statutes. It recalls Mr. Justice Holmes' remark in *Buck v. Bell*, 274 U.S. 200, 208 (1927) that the Equal Protection clause "is the usual last resort of constitutional arguments."

3. ALLEGED THIRD CLASS

The third "class" postulated by Housing Authority is "all who would benefit from federally funded state or local projects" (p. 19). This, as just seen at p. 24 above, is the only "class" the court below conceived. That court cursorily purported to find a contrast between how California acted toward federal aid for low-income housing and how it acted toward federal aid for "highways, urban renewal, hospitals, colleges and universities, secondary schools, law enforcement assistance, and model cities." Our opening brief exposed that reasoning as quite without substance (O.B. 45-52). None of our adversaries really tries to sustain it. Instead, they cast about for a variety of other reasons, never mentioned in the case below (e.g., Valtierra, p. 33).

Housing Authority disavows that it claims that either all or none of the federally funded local projects must be submitted to voter approval (pp. 19, 20), but it claims that to warrant different treatment there must be "a compelling state interest". We have answered that argument at pp. 10-16, *supra*.

(a) Fiscal considerations

Our opening brief (at pp. 33-35) discussed the fiscal considerations that both prompted adoption of Article XXXIV and justify it constitutionally, and we pointed to California public policy since 1879 that major public indebtedness may not be incurred without approval by the voters.

Our adversaries are not consistent in their response. Housing Authority tries to deny or belittle the fiscal burdens imposed on

the locality by a public housing program.²⁴ Valtierra, however, (p. 47) concedes, "we do not deny that they exist" but tries to sweep them under the rug by arguing that they "do not differ in either nature or degree" from other costs of local government (p. 47) and that the federal government considers them to be "a reasonable and necessary contribution by the local government" (p. 11). They are indeed "necessary" if a project is to succeed, and they may be "reasonable" if the locality chooses to participate. *But that is why the voters of the locality should have the final voice on whether to participate.* The *amicus* (N.Y. 13) indulges in tentative speculations that "*it can be argued* with considerable cogency" that maintaining inadequate housing "is likely" to cost the community more than its contributions to new housing in terms of proneness to fire and breeding of crime. Anything "can be argued". But more than hazarding speculations about possibilities is necessary to overcome the judgment of the State in creating classifications; he who assails a classification must demonstrate its irrationality.

Since existence of the fiscal burden on the community cannot really be denied, our adversaries next argue that the California policy that public indebtedness be not incurred without prior voter approval is not applicable because California Constitution Article XIII, Sec. 40²⁵ has been judicially construed as applying only to bonded indebtedness constituting a general obligation and not to revenue bonds or obligations payable from special funds or other ingenious devices like sale-leaseback (Valtierra 49, 50; Housing Authority, 32). That is not only no answer; it demon-

24. Housing Authority, 6, says: "*No local funds are used; the development and construction costs are borne completely by the federal government and by the tenant of the housing units*". (Emphasis in original) This is almost a verbatim copy of a statement on Valtierra's motion to affirm (quoted at O.B. 34, 35) which we demonstrated to be "either naive or uncandid." (O.B. 34, 35) Its repetition now deserves stronger characterization.

25. Until June 1970 this was numbered Art. XI, Sec. 18, and is so referred to in our opening brief.

strates the very reverse. In 1879, when the California constitutional prohibition of incurring debt without prior public approval was adopted, indebtedness constituting a general obligation was *the* way public indebtedness was incurred. Our opening brief observed that, as time passed, the ingenuity of politicians and financiers created "new or ingenious devices" to which the words of the Constitution of 1879 did not fit, thus eluding the state constitutional controls, and that as this has happened the public has sometimes enacted measures to regain control (O.B. 34). Valtierra falls into a non-sequitur in arguing (pp. 50, 51) that the 1939 decision of the California Supreme Court, holding bonds of housing authorities not subject to Art. XI, Sec. 18, was not an "erosion", because other decisions have exempted other situations. The authors of Housing Authority's brief, partners in the largest law firm in California, understand California's history better; they admit that the new financing methods were held not subject to Art. XI, Sec. 18 "because the words of the 1879 Constitution did not fit new or ingenious devices" (Housing Authority 32, 33).

It was to rectify this erosion *with respect to low rent public-housing projects* that Article XXXIV was adopted, to bring housing back within the traditional controls. It may be that "new or ingenious devices" affecting other matters have not been restored to the traditional controls. But must California restore everything to the traditional controls before it can restore anything? Must it catch all before it can catch any? This is but a specific application of the fundamental (O.B. 54) that the Equal Protection clause does not "forbid[]" a State from requiring voter approval of anything unless it requires voter approval of everything" and (O.B. 57) that the judgment below rests on a notion of law that gives voters but two choices, "either not to act at all when an abuse comes to their attention or else to devise an all-inclusive body of regulation that would cover all possible situations that acute minds might later think to be similar."

Moreover, most of the examples where Article XIII, Sec. 40 (former Art. XI, Sec. 18) has been held not to apply are situations where the fiscal burden does not fall on the general taxpayer but is paid only out of revenues of special operations or special funds.²⁶ *But the fiscal burden falling on a locality from low-rent housing falls on the general taxpayer*, and does so for 40 years (O.B. 34, 35). *Cipriano v. Houma*, 395 U.S. 701, 705 (1969), one of Valtierra's citations, recognizes the unique interest of all taxpayers in the right to vote to prevent *any kind of general monetary burden* from being incurred.

(b) Non-fiscal considerations

Discussing the non-fiscal consideration why voters should have the final word, our opening brief (pp. 35-38) noted that the history of low-income housing under the federal Housing Act had led to much disillusionment, and we spoke of "institutional design and mammoth size". We could have pointed to Pruitt-Igoe in St. Louis, an excruciatingly embarrassing example to public housing advocates of the failure of public housing.²⁷ The purpose of our discussion was to note that

"Public housing can have major sociological effects. *Voters are entitled to a direct voice in decisions which alter the characteristics of their very environment for generations.*" (O.B. 38; emphasis in original)

26. See fn. 56, pp. 50, 51 of Valtierra brief.

27. In the spring of 1970 a citizens' alliance ended a rent strike that nearly forced the St. Louis Housing Authority into bankruptcy. An Associated Press News Special, dated April 27, 1970, entitled "Crisis in Public Housing", discloses that the vacancy rate at Pruitt-Igoe was 50%, that even the poor refused to live in such projects, that the vacancies cost the Housing Authority \$500,000 in 1968, and that a Civil Alliance for Housing hopes to turn over the ownership and management of St. Louis' nine projects to tenant cooperatives, thus placing low-cost housing in the private sphere. The World (San Francisco Chronicle,) Sunday, Nov. 15, 1970, carries a long dispatch from New York Times Service entitled "The Case Study of a Housing Failure", i.e. Pruitt-Igoe.

Appellees' response to this is a miscellany of avoidance. With some fencing,²⁸ the brunt of the reply is that housing experts *now* recognize the undesirability of institutional housing. They say that *in 1968* Congress ordered that HUD not normally approve high-rise projects, and that in 1969 HUD announced that it had "moved away from the massive, monolithic buildings of the past [and is] now * * * emphasizing small projects and individual units". They say that by enactment *in 1968* Congress emphasized the need of good design related to the architectural standards "of the neighborhood community in which it is situated, consistent with prudent budgeting" (Valtierra 53, 54; Housing Authority, 36).

Did Article XXXIV thus become unconstitutional in 1968 or 1969 because at long last, 18 and 19 years after Article XXXIV was adopted, housing "experts" caught up with voter wisdom? Now that experts have caught up with the electorate as to this aspect of public housing, has the right of the electorate to be heard been superseded by the superior expertise of administrative officials or of elected officials subject to pressure groups such as the mass of organizations that sought to appear in this case as *amici*?

Numerous considerations remain on which the public is entitled to the last word. For example, today San Francisco is torn in controversy over massive high-rise buildings threatening to alter the unique characteristics of that City; experts are for and against. The very fact that Congress has recognized the need of "good design related to community standards consistent with prudent budgeting" is all the more reason why the people in the community should have a right to pass on whether the

28. Appellees counter that the project voted down in San Jose was for dispersal of small units (Valtierra, 54, fn. 61; Housing Authority, 36). But our brief stated that fact (O.B. 37, fn. 24) and noted its irrelevance because "the judgment below is not limited to San Jose. It outlaws Article XXXIV throughout the State. [The facts] show the variety of considerations an electorate may legitimately consider."

standards are met and what is prudent budgeting in the circumstances.

In still another way, our adversaries' arguments raise the question whether it is claimed that what was constitutional when adopted in 1950 has become unconstitutional now. This case rests on assertions about the racial makeup of California. Census data of the 1970 census are not yet available. Data reported for 1967 show that the sum of Negro and Spanish-surname population of California was 18.3% of the total population.²⁹ It is from data such as this that appellees try to squeeze a case. But in 1950 the sum of the Negro and Spanish-surname population was 11.6% of the total population, a percentage less than the 1967 percentage by roughly half of that figure.³⁰

4. ALLEGED FOURTH "CLASS"

Housing Authority's fourth "class" is "all who benefit from federal financial assistance to housing" (Housing Authority, 8, 20). But all federal assistance to moderate income housing is made directly by the federal government without intermediation of the State (see p. 25, *supra*).

IV.

THE CASE MUST BE DECIDED ON THE FACE OF ARTICLE XXXIV

Our opening brief submitted that the district court declared Article XXXIV unconstitutional purely on its face, as an abstract textual conclusion reached by laying it alongside the 14th Amendment (O.B. 14), that summary judgment can be affirmed only if the unconstitutionality follows *per se* from *that* kind of

29. Financial and Population Research Section, California State Department of Finance, Sacramento, August 27, 1968.

30. U.S. Bureau of the Census: U.S. Census of Population, 1960, Vol. I, part 6, California, Table 15 gives the data for Negroes. Californians of Spanish surname, State of California, Department of Industrial Relations, Division of Fair Employment Practices, San Francisco, May, 1964, p. 11, gives the data for Spanish surname.

comparison, and therefore that it cannot be supported by alleged statistics. Our adversaries' response is various and inconsistent.

For example, when we pointed out (O.B. 36) that the history of low-income public housing was disfigured by mammoth institutional installations, Valtierra responds (p. 54) that the particular project voted on in San Jose was not that kind. Inconsistently, in response to our statistics tending to show that in the City of San Jose and its county poverty does not equal race (O.B. 30), our adversaries rejoin that the local situation is not relevant because the constitutionality of Article XXXIV is a state-wide matter (Valtierra, 65, 66; Housing Authority, 23). Then, more inconsistently they flood the briefs with alleged data relating to the whole nation.³¹

When we point out that the vast majority of low-income housing projects has been approved by California voters (O.B. 28, 29), Valtierra (p. 71) appeals to *ex parte* hypothesis that projects may never have been proposed by local authority for fear that they would be rejected. (The crumb of truth in that hypothesis is that knowledge that a project will go to public vote leads housing authorities and local governing bodies to act more prudently and to heed less supinely clamor of special interests. This restraining influence is one of the great virtues of the referendum device praised by observers. Crouch, *The Initiative and Referen-*

31. Appellees from time to time refer to statistics about San Mateo County and seek to justify that course by erroneously asserting that this case originated as two separate actions, *Valtierra v. City of San Jose*, and *Hayes v. County of San Mateo* (Housing Authority, 4). Those two suits did not become one; consolidation below, *ex mero motu*, did not make them one. Consolidation does not merge identity of cases (Moore's Federal Practice (2nd ed.), § 42.02, pp. 42-21, 42-22). All defendants in the San Mateo suit defaulted (A. 160, Valtierra, 18), and no appeal was taken in it. Since the motion for summary judgment here did not specify that it relied on any part of the *Hayes* record (O.B. 13), none of the *Hayes* record is part of the record here.

Valtierra's assertion (p.21) that appellants reproduced the *Hayes* record in the Appendix is disingenuous. This Court's Rules 17 and 36 require a single appendix to contain what all parties request; it was appellees who included *Hayes*. That does not make it part of the record.

dum in California, p. 29). When we point out that the incomplete statistics the district court referred to in its opinion had never been offered in evidence or authenticated but were merely an attachment to a brief (O.B. 28, fn. 14), Valtierra retorts (p. 74) that the document gains authenticity from the fact it was presented to the California Constitutional Revision Commission by a private group. But Valtierra rejects as unauthenticated our reference to a study submitted to the City of San Jose itself at its request by Kaiser Engineers (Valtierra, 65).

In objecting to statistics and data in our opening brief as not in the record and in asserting that defendants had every opportunity "to submit material for the record on summary judgment" (Valtierra, 21, 65; Housing Authority, 23),³² appellees ignore our statement (O.B. 30):

"If this case involved private interests alone and were truly an adversary contest, failure of defendants to respond to the motion for summary judgment adequately might possibly preclude reliance in this Court on matter not in the record. *But this is not a private controversy.* It involves the very factor which lies behind the direct appeal from a judgment of a three-judge court—'procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy', *Phillips v. United States*, 312 U.S. 246, 251 (1941)."

Inconsistently appellees sprinkle their briefs with presumed statistics not in the record.

If *any* of the facts the statistics are supposed to establish are relevant, a summary judgment below and proliferation of statistics in the briefs above constitute an unpardonable way to test and weigh them. Housing Authority (23) criticizes our statistical

32. Valtierra argues (p. 21) that appellant Shaffer could have offered data below. But Mrs. Shaffer, as one of the city councilmen, was represented by the City Attorney's office. When realization came to her at the time the hasty appeal was taken that the City Council wished to lose the case, she obtained new counsel.

presentation on the ground that "isolated and selected statistics from different reports and affidavits" are combined to misleading conclusions. But precisely our point is that statistics and experts' opinions require acute scrutiny. Our statistics were presented to show how untrustworthy were Valtierra's *ex parte* data below, acquiesced in by Valtierra's fictitious adversary, Housing Authority. Statistics and opinion evidence can be safely used only under the testing of a plenary trial.

Appellees prevailed on a summary judgment. That judgment must be reversed unless required from the bare inspection of Article XXXIV.

V.

ANSWER TO THE SUPREMACY ARGUMENT

Valtierra finally seeks to support the judgment by an argument which the court below rejected as unpersuasive, i.e., that Article XXXIV is invalid under the Supremacy Clause.

In areas where the central government has power to legislate directly upon the people or to reach its hand to them directly without the intermediary of the State, and where it exercises that power, no state may veto or hamper its action. Where the United States confers a right, no state may punish or impede its exercise. That is all that is held in *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967), cited Valtierra, p. 69.³³

But in the present case the central government has not purported to exercise any such power. It has not commanded that there be low income housing; in that area it has not seen fit to act directly upon the people. Contrary to Valtierra's assertion (p. 6), by the Housing Act of 1937 the United States did *not* declare it to be its policy to alleviate or remedy housing conditions. The policy it declared was "*to assist the several states and their politi-*

33. In *Nash* the United States conferred a federal right to appeal to the National Labor Relations Board, and Florida was denied the power to obstruct that appeal.

cal subdivisions" to do so.³⁴ What the United States has done is to offer financial assistance to the States, which they are free to accept or not as they wish. It cannot order them to accept the aid and put a program into effect. *And if it could, it has not.*

Congress has the power to prescribe the minimum acts of acceptance without which it will withhold its assistance in federally assisted projects. But it cannot deny to the States the power to determine whether and how to accept the assistance. *And if it could, it has not.*

Congress can prescribe that, *if* its assistance is accepted, it must be passed on to those people who it commands shall receive it, and if the State sees fit to accept the assistance, it must honor the terms of the grant. That is all that is held in *King v. Smith*, 392 U.S. 309 (1968) and *Thorpe v. Housing Authority*, 393 U.S. 268 (1969), cited Valtierra, p. 69.³⁵

It is within the area of power of the United States to fix the terms upon which it offers its aid to the States. It is within the area of power of the States to fix the terms on which they will accept the offer. If the exercise by each of *its* power produces accord, there is a federally-aided program; otherwise not. If an accord is reached, the State must abide by the terms of the accord. If Congress purported to act within the States' area, a supremacy question would arise. But Congress has not purported so to act. There is no conflict, and no supremacy question.

34. The Act is quoted in the appendix to the Valtierra brief.

35. In *King v. Smith*, Alabama accepted the federal government's program for Aid to Families with Dependent Children. The federal government prescribed that the aid must be given to dependent children if a "parent" is continually absent from the home. Alabama was denied the power to withhold that aid by the device of defining as a "parent" one who is not a parent within the meaning of the federal grant. In *Thorpe*, North Carolina accepted federal housing assistance and was denied power to evict a tenant contrary to instructions of the H.U.D. within the latter's statutory competence to impose.

CONCLUSION

It is respectfully submitted that the judgment should be reversed with directions to dismiss the complaint.

Dated: San Francisco, California, December 1, 1970.

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 154 & 228.—OCTOBER TERM, 1970

Ronald James et al.,

Appellants,

154

v.

Anita Valtierra et al.,

Appellees.

Virginia C. Shaffer,

Appellant,

228

v.

Anita Valtierra et al.,

Appellees.

On Appeals From the United
States District Court for the
Northern District of California.

[April 28, 1971]

MR. JUSTICE BLACK delivered the opinion of the Court.

These cases raise but a single issue. It grows out of the United States Housing Act of 1937, 42 U. S. C. § 1401 *et seq.*, which established a federal housing agency authorized to make loans and grants to state agencies for slum clearance and low-rent housing projects. In response, the California Legislature created in each county and city a public housing authority to take advantage of the financing made available by the Federal Housing Act. See California Health and Safety Code § 34240. At the time the federal legislation was passed the California Constitution had for many years reserved to the State's people the power to initiate legislation and to reject or approve by referendum any Act passed by the state legislature. California Const. Art. IV, § 1. The same section reserved to the electors of counties and cities the power of initiative and referendum over acts

of local government bodies. In 1950, however, the State Supreme Court held that local authorities' decisions on seeking federal aid for public housing projects were "executive" and "administrative," not "legislative," and therefore the state constitution's referendum provisions did not apply to these actions.¹ Within six months of that decision the California voters adopted Article XXXIV of the state constitution to bring public housing decisions under the State's referendum policy. The Article provided that no low-rent housing project should be developed, constructed or acquired in any manner by a state public body until the project was approved by a majority of those voting at a community election.²

The present suits were brought by citizens of San Jose, California, and San Mateo County, localities where housing authorities could not apply for federal funds because

¹ *Housing Authority v. Superior Court*, 35 Cal. 2d 550, 557-558 (1950).

² "Section 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

"For the purpose of this article the term 'low rent housing project' shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. . . .

"For the purposes of this article only 'persons of low income' shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding"

low-cost housing proposals had been defeated in referendums. The plaintiffs, who are eligible for low-cost public housing, sought a declaration that Article XXXIV was unconstitutional because its referendum requirement violated: (1) the Supremacy Clause of the United States Constitution; (2) the Privileges and Immunities Clause; and (3) the Equal Protection Clause. A three-judge court held that Article XXXIV denied the plaintiffs equal protection of the laws and it enjoined its enforcement. 313 F. Supp. 1 (ND Cal. 1970). Two appeals were taken from the judgment, one by the San Jose City Council, and the other by a single member of the council. We noted probable jurisdiction of both appeals. 398 U. S. 949 (1970); 399 U. S. 925 (1970). For the reasons that follow, we reverse.

The three-judge court found the Supremacy Clause argument unpersuasive, and we agree. By the Housing Act of 1937 the Federal Government has offered aid to States and local governments for the creation of low-rent public housing. However, the federal legislation does not purport to require that local governments accept this or to outlaw local referendums on whether the aid should be accepted. We also find the privileges and immunities argument without merit.

While the District Court cited several cases of this Court, its chief reliance plainly rested on *Hunter v. Erickson*, 393 U. S. 385 (1969). The first paragraph in the District Court's decision stated simply: "We hold Article XXXIV to be unconstitutional. *Hunter v. Erickson*" The court below erred in relying on *Hunter* to invalidate Article XXXIV. Unlike the case before us, *Hunter* rested on the conclusion that Akron's referendum law denied equal protection by placing "special burdens on racial minorities within the governmental process." *Id.*, at 391. In *Hunter* the citizens of Akron had amended the city charter to require that any

ordinance regulating real estate on the basis of race, color, religion, or national origin could not take effect without approval by a majority of those voting in a city election. The Court held that the amendment created a classification based upon race because it required that laws dealing with racial housing matters could take effect only if they survived a mandatory referendum while other housing ordinances took effect without any such special election. The opinion noted:

"Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustifiable official distinctions based on race, [citing a group of racial discrimination cases] racial classifications are 'constitutionally suspect' . . . and subject to the 'most rigid scrutiny. . . .' They bear a far heavier burden of justification than other classifications. . . ." *Id.*, at 391-392.

The Court concluded that Akron had advanced no sufficient reasons to justify this racial classification and hence that it was unconstitutional under the Fourteenth Amendment.

Unlike the Akron referendum provision, it cannot be said that California's Article XXXIV rests on "distinctions based on race." *Id.*, at 391. The Article requires referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority. And the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority. Cf. *Gomillion v. Lightfoot*, 364 U. S. 339 (1960). The present case could be affirmed only by extending *Hunter*, and this we decline to do.

California's entire history demonstrates the repeated use of referendums to give citizens a voice on questions of public policy. A referendum provision was included in

the first state constitution, Calif. Const. of 1849, Art. VIII, and referendums have been a commonplace occurrence in the State's active political life.³ Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice. Nonetheless, appellees contend that Article XXXIV denies them equal protection because it demands a mandatory referendum while many other referendums only take place upon citizen initiative. They suggest that the mandatory nature of the Article XXXIV referendum constitutes unconstitutional discrimination because it hampers persons desiring public housing from achieving their objective when no such roadblock faces other groups seeking to influence other public decisions to their advantage. But of course a lawmaking procedure that "disadvantages" a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to "disadvantage" any of the diverse and shifting groups that make up the American people.

Furthermore, an examination of California law reveals that persons advocating low-income housing have not been singled out for mandatory referendums while no other group must face that obstacle. Mandatory referendums are required for approval of state constitutional amendments, for the issuance of general obligation long-term bonds by local governments, and for certain municipal territorial annexations. See Calif. Const. Art. XVIII, Art. XIII, § 40; Art. XI, § 2 (b). Cali-

³ See, e. g., Crouch, Winston W. "The Initiative and Referendum in California," The Haynes Foundation, Los Angeles, 1950.

California statute books contain much legislation first enacted by voter initiative, and no such law can be repealed or amended except by referendum. Calif. Const. Art. IV, § 24 (c). Some California cities have wisely provided that their public parks may not be alienated without mandatory referendums, see, e. g., San Jose Charter, § 1700.

The people of California have also decided by their own vote to require referendum approval of low-rent public housing projects. This procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues.⁴ It gives them a voice in decisions that will affect the future development of their own community. This procedure for democratic decision-making does not violate the constitutional command that no State shall deny to any person "the equal protection of the laws."

The judgment of the three-judge court is reversed and the case is remanded for dismissal of the complaint.

Reversed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

⁴Public low-rent housing projects are financed through bonds issued by the local housing authority. To be sure, the Federal Government contracts to make contributions sufficient to cover interest and principal, but the local government body must agree to provide all municipal services for the units and to waive all taxes on the property. The local services to be provided include schools, police, and fire protection, sewers, streets, drains, and lighting. Some of the cost is defrayed by the local governing body's receipt of 10% of the housing project rentals, but of course the rentals are set artificially low. Both appellants and appellees agree that the building of federally-financed low-cost housing entails costs to the local community. Appellant Shaffer's Brief, at 34-35. Appellee's Brief, at 47. See also 42 U. S. C. §§ 1401-1430.

SUPREME COURT OF THE UNITED STATES

Nos. 154 & 226.—OCTOBER TERM, 1970

Ronald James et al.,

Appellants,

154 v.

Anita Valtierra et al.

On Appeals From the United States District Court for the Northern District of California.

Virginia C. Shaffer,

Appellant,

226 v.

Anita Valtierra et al.

[April 26, 1971]

MR. JUSTICE MARSHALL, whom MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN join, dissenting.

By its very terms, the mandatory prior referendum provision of Article 34 applies solely to

"any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise."

Persons of low income are defined as

"persons or families who lack the amount of income which is necessary . . . to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding."

The article explicitly singles out low-income persons to bear its burden. Publicly assisted housing developments designed to accommodate the aged, veterans, state em-

ployees, persons of moderate income, or any class of citizens other than the poor, need not be approved by prior referendum.*

In my view, Article 34 on its face constitutes invidious discrimination which the Equal Protection Clause of the Fourteenth Amendment plainly prohibits. "The States, of course, are prohibited by the Equal Protection Clause from discriminating between 'rich' and 'poor' as such in the formulation and application of their laws." *Douglas v. California*, 372 U. S. 353, 361 (1963) (MR. JUSTICE HARLAN, dissenting). Article 34 is neither "a law of general applicability that may affect the poor more harshly than it does the rich," *ibid*, nor an "effort to redress economic imbalances," *ibid*. It is rather an explicit classification on the basis of poverty—a suspect classification which demands exacting judicial scrutiny, see *McDonald v. Board of Education*, 394 U. S. 802, 807 (1969); *Harper v. Virginia Board of Elections*, 383 U. S. 663 (1966); *Douglas v. California*, 372 U. S. 353 (1963).

The Court, however, chooses to subject the article to no scrutiny whatsoever and treats the provision as if it contained a totally benign, technical economic classification. Both the appellees and the Solicitor General of the United States as *amicus curiae* have strenuously argued, and the court below found, that Article 34, by imposing a substantial burden solely on the poor, violates the Fourteenth Amendment. Yet after observing that the article does not discriminate on the basis of race, the Court's only response to the real question in this case is

*California law authorizes the formation of Renewal Area Agencies whose purposes include the construction of "low income, middle income and normal market housing," California Health and Safety Code §§ 33701 *et seq*. Only low income housing programs are subject to the mandatory referendum provision of Article 34 even though all of the agencies' programs may receive substantial governmental assistance.

the unresponsive assertion that "referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice." It is far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimination; and to me, singling out the poor to bear a burden not placed on any other class of citizens tramples the values that the Fourteenth Amendment was designed to protect.

I respectfully dissent.